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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of The United States

October Term, 1978

No. 79-374

BIRMINGHAM TRUST NATIONAL BANK,
Petitioner,

v.

JACK H. HARRISON, Temporary Trustee of the Linn-Henley Charitable Trust; CHARLES A. GRADDICK, Attorney General of the State of Alabama; and JOHN C. HENLEY, III,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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September 5, 1979

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(3) Circuit Court, Tenth Judicial Circuit of Alabama, October 4, 1977. [This opinion is copied *verbatim* in the April 6, 1979 opinion of the Supreme Court of Alabama, and is therefore not recopied separately.] See 34-46

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Petitioner Birmingham Trust National Bank respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Alabama entered on April 6, 1979.

Opinions Below

The judgment and opinion of the Alabama Supreme Court is reported at 371 So.2d 883. An earlier opinion of the Alabama Supreme Court in the same litigation is reported at 295 Ala. 38, 322 So.2d 688 (1975). The underlying judgments of the Circuit Court for the Tenth Judicial Circuit of Alabama are not reported, but appear in the Appendix to this Petition, along with both opinions of the Alabama Supreme Court.

Jurisdiction

The judgment and opinion of the Supreme Court of Alabama for which review is sought was entered April 6, 1979. Separate petitions for rehearing were filed by all parties, all of which were denied by an order entered June 8, 1979. This petition was filed within 90 days thereafter. This Court's jurisdiction is invoked under 28 USC 1257(3).

Questions Presented

1. Whether, in view of the Supremacy Clause of the United States Constitution, a state court may override an appraisal by the Comptroller of the Currency of national bank stock surrendered by one who dissents from a national bank merger, when the relevant federal statute declares that the Comptroller's appraisal "shall be final and binding on all parties."

2. If so, whether the state court can determine the value of such shares based on operations of the surviving bank in periods subsequent to the merger, when the relevant federal statute declares that the value is to be determined "as of the effective date of the merger."

Statutory Provisions Involved

United States Code, Title 12:

> §*215a.* (a) One or more national banking associations . . . with the approval of the Comptroller, . . . may merge into a national banking association located within the same State, under the charter of the receiving association. . . .
>
> * * *
>
> (c) The value of shares of any dissenting shareholder shall be ascertained, *as of the effective date of the merger*, . . .
>
> (d) If, within ninety days from the date of consummation of the merger, for any reason one or more of the appraisers is not selected as herein provided, or the appraisers fail to determine the value of such shares, the Comptroller shall upon written request of any interested party cause an appraisal to be made which *shall be final and binding on all parties*. . . .
>
> * * *
>
> [The full text of Title 12 USC 215a is copied in the Appendix.]

Statement of the Case

This Petition presents only one of the several issues tried in the underlying litigation, which is the product of a multi-faceted dispute between the two co-trustees of a testamentary charitable trust, known as the Linn-Henley Charitable Trust (the "Trust"). Petitioner, Birmingham Trust National Bank ("BTNB"), is the corporate trustee; the other trustee is the respondent John C. Henley, III ("Mr. Henley"), a nephew of the testator. The testator's estate included a block of shares of Petitioner BTNB, which was retained as part of the assets of the Trust. Through stock dividends this block had, by 1968, increased to 27,460 shares, which then represented 2.746% of the outstanding shares of BTNB and approximately 45% of the assets of the Trust.

The genesis of the dispute between the co-trustees was a decision by the management of BTNB, in the latter part of 1968, to reorganize the bank so as to form a one-bank holding company.[1] At the shareholder's meet-

[1]The term "one-bank holding company" is not based on any statutory provisions, but was commonly used in the banking community to designate a holding company which owned more than 25% of the stock of a single

ing held in November 1968, Mr. Henley actively opposed the reorganization and, under authority of 12 USC 61, voted the Trust's shares against the proposal. However, the reorganization was approved by the requisite number of shareholders, and by the Comptroller of the Currency,[2] and it became effective December 31, 1968.

The reorganization was accomplished by merging "old" BTNB into a newly organized national bank, all the shares of which were owned by a newly formed Delaware business corporation (the "Holding Company"). The Holding Company issued its stock in a one-for-one exchange for shares of "old" BTNB. The surviving national bank changed its name to Birmingham Trust National Bank and continued essentially the same operations. For practical purposes, the only assets of the Holding Company were its shares in the surviving national bank. Shareholders of "old" BTNB thus became shareholders of the Holding Company but were able, effectively, to maintain their respective equity interests in the underlying national bank.

Purporting to act on behalf of the Trust, but without any prior discussion on the subject of dissent with his co-trustee (BTNB), Mr. Henley undertook to dissent from the merger which, as explained above, was an integral part of the reorganization. In its capacity as trustee, BTNB did not consider it to be in the best interest of the Trust to dissent from the merger. The trustees thus came to an impasse.

Neither trustee took steps to cause an appraisal of the

bank. As such, it could engage in businesses other than banking and was not subject to supervision of the Federal Reserve Board pursuant to 12 USC 1841-8, as those sections existed prior to the Bank Holding Company Act of 1970, approved December 31, 1970.

[2]The decision of the Comptroller of the Currency is reported at page 133 of his 1968 Annual Report to Congress.

Trust's stock to be made by a committee [one method provided in 12 USC 215a(c)], nor did they reach agreement on the matter of whether the Trust should or should not dissent from the merger until BTNB decided, in September, 1969, to acquiesce in Mr. Henley's persistent determination to have the Trust do so.

On September 23, 1969 BTNB requested the Comptroller to cause the necessary appraisal to be made. In its initial request to the Comptroller, BTNB offered to supply any information desired by the Comptroller. (CC Ex. 43) A representative of the Comptroller contacted counsel for BTNB and requested information concerning the market prices and the volume of trading in BTNB's stock prior to the merger. The requested information was furnished. (CC. Ex. 32, 33; BTNB Ex. 122) No further information was requested by the Comptroller.

At least as early as May of 1969, Mr. Henley had employed separate counsel to represent the Trust. On October 23, 1969, this separate counsel wrote to the Comptroller asking permission to submit information relating to the appraisal (CC Ex. 166), but did not submit any such information. On December 5, 1969, the Comptroller wrote to the Trust's separate counsel asking if he still intended to submit any information. (BTNB Ex. 122) The Trust's separate counsel replied on December 9, 1969, asking for additional time and promising a submission before the end of that year (BTNB Ex. 122), but nothing was ever submitted to the Comptroller by or on behalf of Mr. Henley or the Trust. (R. 5425-9, 6714, 6718)

On January 8, 1970 the Trust's separate counsel wrote to BTNB's counsel asking for copies of Annual Reports (to stockholders) and "internal audits" for the 5 years preceding the merger, claiming he wanted to use this

information in preparing a submission to the Comptroller. (CC Ex. 141) Copies of the Annual Reports were furnished as requested. However, in response to the request for "internal audits" BTNB expressed the view that they would not provide any information that would be useful in the Comptroller's appraisal and, because they contained confidential information about customers' accounts, BTNB declined to furnish reports of the internal audits. (CC Ex. 65) On January 19, 1970 the Trust's separate counsel wrote to the Comptroller stating that, because BTNB had not furnished the internal audits as requested, and in view of the delay that had already occurred, Mr. Henley would not request any further delay in announcement of the Comptroller's appraisal. (CC Ex. 149)

On January 21, 1970 the Comptroller reported his appraisal, finding that, at the effective date of the merger (December 31, 1968), the stock of "old" BTNB had a value of $32.80 per share, making a total of $900,688 for the 27,460 shares surrendered. (CC Ex. 146) This amount was promptly paid by "new" BTNB to the Trust and was accepted by Mr. Henley on behalf of the Trust. In so doing he notified BTNB that he did not wish to waive any further rights that might be available to the Trust, mentioning specifically "any further amounts that may be due under the statutory formulas or otherwise." (RX-1)

The Comptroller's file on the appraisal shows that the appraiser compiled financial data from the Call Reports and the Reports of Income and Dividends that BTNB had regularly submitted to the Comptroller's office and that he compared BTNB's assets, performance and stock prices to the assets, performance and stock prices of other national banks. It also shows that the Comptroller

utilized published market data on bank stocks and made comparisons of price-earnings ratios in arriving at his announced value of $32.80 per share. (BTNB Ex. 122) This was somewhat above the quoted market for BTNB's stock which, at December 31, 1968, was $30 bid, $31 asked. (R. 4456, 4461, 5214, 5866)

Following payment of the appraised value, BTNB proceeded to hold a public auction as required by 12 USC 215a(d). The only bidder was BTNB's Holding Company and the bid price was less than $32.80 per share, so no further payment was made to the Trust as a result of the auction.

Mr. Henley had asserted, and continued to assert, various claims of illegality and impropriety respecting BTNB's actions in connection with the reorganization, especially BTNB's opposition to his desire to have the Trust dissent from the merger and BTNB's conduct of the subsequent auction. He demanded that BTNB resign as trustee and pay various additional amounts to the Trust. After a period of unfruitful negotiations, BTNB, on October 6, 1971, petitioned the Circuit Court for the Tenth Judicial Circuit of Alabama for approval of an interim accounting of transactions affecting the Trust. In this petition BTNB sought a declaration that BTNB's actions relating to the merger and reorganization and the subsequent dissent from the merger on behalf of the Trust had been proper or, if not proper, instructions as to what further actions, if any, should be taken by BTNB in the premises.

In that proceeding Mr. Henley, acting on behalf of the Trust, filed a counterclaim setting forth numerous grievances against BTNB relating to the reorganization, the subsequent auction and other matters. In paragraph 3 of his counterclaim, Mr. Henley asserted, *inter alia*, that

the Comptroller's appraisal was grossly inadequate and that the fair value of the stock was actually $42.29 per share. Mr. Henley demanded judgment against BTNB for the difference between $42.29 per share and the amount theretofore paid by BTNB in response to the Comptroller's appraisal.

a. Federal Question Number One Raised in the Court of First Instance on First Trial and on First Appeal

BTNB demurred to Mr. Henley's claim that the Comptroller's appraisal was inadequate, *inter alia*, on the ground that it constituted an unauthorized attempt to collaterally attack the result of an appraisal by the Comptroller of the Currency which, under provisions of 12 USC 215a(d), is final and binding on all parties. BTNB's demurrers were overruled. BTNB then answered, denying the material allegations of Mr. Henley's cross-bill.

At the trial, Mr. Henley was permitted, over the objection of BTNB, to offer evidence in support of his allegation that the value of the stock surrendered was $42.29 (R. 672-4) Following the first trial in the Circuit Court, a judgment was entered on September 24, 1973, which made *no finding of liability* against BTNB based on any inadequacy in the Comptroller's appraisal.

Mr. Henley thereafter appealed to the Supreme Court of Alabama. In a split decision, the Supreme Court of Alabama reversed and remanded for a new trial on several issues, including directions permitting a re-appraisal of the shares that had already been appraised by the Comptroller. The majority opinion of the Alabama Supreme Court shows that the first federal question presented by this Petition was raised on that first appeal. [See App. 76; 295 Ala. at p. 46; 322 So.2d at p. 694.]

b. Federal Question Number Two Raised in the Court of First Instance on Second Trial

Following remand, revised pleadings on behalf of the Trust again raised the issue of the inadequacy of the Comptroller's appraisal, alleged to have been induced by BTNB's failure to furnish the "internal data" that had been requested by the Trust's separate counsel. (Counts VI and VIII)

However, in the second trial, held in May-July 1977, much of the evidence introduced on behalf of the Trust in support of a higher valuation of the stock related to the earnings produced and the dividends paid by "new" BTNB *subsequent* to December 31, 1968, and to other events subsequent to that date. Witnesses called on behalf of the Trust to give opinion testimony on this valuation issue placed great emphasis on BTNB's post-merger earnings and dividends as late as 1976[3] and on prices paid by BTNB's Holding Company, and by another holding Company, for the stock of other banks in 1972-1974 (CC Ex. 79-82), all long after the effective date of the merger. BTNB objected to such evidence and argued to the trial court that the opinions based on it should be rejected, because it could not have been known on the date as of which the appraisal was required to be made and because the events occurred under materially different conditions. (*E.g.*, R. 850-5, 874-6, 897-8, 910-2, 4730, 4743-4.)

Following the second trial a judgment was entered on

[3]Two of these witnesses, with academic backgrounds, supported a formula approach to valuation, a critical factor in which is the anticipated growth rate of earnings. For this factor, they used a compound growth rate based on postmerger dividends paid by BTNB in 1969-1976, a period during which BTNB enjoyed exceptional growth (R. 4425, 45012, 7179-81) influenced by changes in the banking laws that occurred subsequent to the merger and, admittedly, could not have been foreseen at the time of the merger. (R. 4506-10, 4715-8)

October 4, 1977 in which the trial court fixed a value of $50 per share for the stock surrendered by the Trust and entered judgment against BTNB, *inter alia*, for the difference between that amount and the $32.80 fixed by the Comptroller (on 27,460 shares) plus interest from December 31, 1968. The trial court imposed this liability because it found, contrary to its findings on the first trial, a breach of BTNB's fiduciary duty to this particular dissenter (a trust of which BTNB was a co-trustee) in BTNB's failure to furnish to the Comptroller the following information for use in making his appraisal:

> (1) All facts which were known to, or which could have been ascertained by BTNB, as of the effective date of the Merger, showing or reflecting the actual, intrinsic or fair value of the "Old" Bank stock as of December 31, 1968, appraising all material factors and elements affecting such value, on the basis that BTNB will continue as a going concern, including the nature and extent of its business and its operations, assets, good will, liabilities, earning capacity, investment value and market value of its stock, the earnings of the "Old" Bank in the past and the regularity of the payment of dividends as well as the future prospects and the growth potential of the bank; an estimate of its future earnings and payment of dividends, and of the expected growth of the bank in earnings and dividends for the future, including an estimate of the dividends expected to be paid by the bank during the year 1969.
>
> (2) The plans and goals which were known, or should have been known to management of BTNB, as of December 31, 1968 for the expansion of its facilities, opening of new branches, expansion of its leadership in the credit card field, the expected international growth for BankAmericard, its plans for the expansion of its computer services; and all other relevant factors which BTNB knew or should have known as of December 31, 1968 showing and indicating that BTNB would enjoy substantial growth in earnings and in payment of dividends in future years, giving due weight to each of the factors entering into a valuation of the stock of the bank on a going concern basis, and exercising in this respect the professional knowledge, skill and business acumen expected of a corporate Co-Trustee, and that diligence and care which a prudent man ordinarily uses in his own concern. (App., pp. 37-8.)

c. Federal Questions One and Two Raised in Appellate Court on Second Appeal

BTNB appealed to the Supreme Court of Alabama. While reversing unanimously as to several other issues where the trial court had imposed liability on BTNB, a majority of the Supreme Court of Alabama affirmed the judgment of the trial court on the issue involving reappraisal of the shares surrendered by the Trust. Again, the opinion of the court below shows the first federal question presented in this petition was raised by BTNB on the second appeal:

> BTNB argues now, as it did on the prior appeal, that the provisions of § 215a(d), Title 12, USC, to the effect that the Comptroller's appraisal "shall be final and binding on all parties" forecloses any question that the appraisal may not have been sufficient in amount. A majority of the court rejected that argument on the prior appeal, holding that if the bank breached its fiduciary duty to the Trust by withholding data which would be material to the Comptroller in making a valid appraisal, it was answerable to the Trust under state law. We adhere to that position. [App. pp. 46-7; 371 So.2d at p. 892.]

Although there is no reference in its opinion to the second federal question presented in this Petition, the improper evidentiary basis for the trial court's finding that the stock had a value of $50 per share on the effective date of the merger was squarely put to the Supreme

Court of Alabama on the second appeal in BTNB's Questions Presented for Review, Numbers 3(b) and 3(c), which were duly argued in briefs and orally.

BTNB's application for rehearing on the reappraisal issue was denied on June 8, 1979 and this Petition was timely filed within 90 days thereafter.

Reasons for Granting the Writ

a. Effect of the Decision Below

The decision below involves a construction of two subsections of the National Bank Act, dealing with mergers of national banks, that have not been heretofore construed by this Court or in the published decisions of any other court. These provisions are of great importance in the management of national banks and the construction given them will have far-reaching effects.

Unless corrected, the decision below will establish a precedent for requiring national banks that have been through a merger to pay dissenting shareholders amounts in excess of the value fixed by the Comptroller of the Currency in appraisals conducted pursuant to the "final and binding" authority vested in the Comptroller by 12 USC 215a(c) and (d). The Alabama Court purports to have imposed this requirement on BTNB to effectuate important principles of the state common law governing trusts; but the action taken by the Alabama Court, in re-determining the value of the dissenter's shares, flies squarely in the face of the Congressional mandate.

In its dealing with the federal statute, the decision of the Alabama Court conflicts with applicable decisions of this Court concerning (a) the controlling effect of federal law; (b) the reviewability of administrative determinations that have been expressly committed to a "final and

binding" determination by a high federal official; and (c) attacking administrative determinations in collateral proceedings, all of which we demonstrate herein.

In addition, the decision below presently represents the only available judicial statement on the kinds of evidence that may be considered in determining the "value" of national bank stock under 12 USC 215a(c) and (d); and it reaches the incongruous result of allowing dissenters to reap benefits from the subsequent success of an enterprise they have chosen to abandon!

The precedent of the decision below is not limited strictly to mergers of national banks. Essentially identical provisions for dealing with dissenting shareholders appear in other sections of the National Bank Act relating to consolidations and mergers involving state and national banks, where the surviving or continuing bank is to be a national bank. [12 USC 214a(b), 215(c)-(d), 215a(c)-(d)]

The Annual Reports to Congress by the Comptroller of the Currency include a listing of the mergers and consolidations involving national banks that have been approved by the Comptroller each year. From these, it is apparent that mergers and consolidations are widely and frequently used by banks under the Comptroller's jurisdiction as a means of meeting competition and adjusting to other changes in business conditions.

Every merger or consolidation (unless it should involve only wholly owned subsidiaries of a single holding company) creates a potential for dissent and for appraisal. Some appraisals may be made by a committee appointed by the dissenters and the banks. These do not require recourse to the Comptroller. However, the objective of all appraisals of dissenters' shares should be to

determine the "value" of those shares as that term is used in 12 USC 215a(c) and (d). There is a rather wide variation among the states as to the proper standards for valuing dissenters' shares under state statutes (*e.g.*, 48 ALR 3rd 430; 79 Harv. L. Rev. 1453) due in part, no doubt, to differences in the terminology of the state statutes. However, there is no available authority, other than the decision below, describing the standards by which the "value" of dissenters' shares under 12 USC 215a, and related sections of the National Bank Act, should be determined. While this statute has been implicitly construed by the Comptroller in this proceeding, only this Court can ultimately determine the standards to be applied. *Inland Waterways Corp.* v. *Young*, 309 U.S. 519, 84 L. Ed. 901 (1940); *Franklin Nat. Bk.* v. *New York*, 347 U.S. 373, 98 L. Ed. 767 (1954).

In the present case, the value fixed by the trial court is supported by evidence of the subsequent success of the continuing bank, primarily in the period 4 to 8 years after the merger. (R. 4425, 4502, 7179-81, 7173-6.) We are not aware of any authority for resort to such post-valuation-date evidence and believe this surely was never the intent of the federal statute, which provides that the value of dissenter's shares is to be determined "as of the effective date of the merger." Consequently, it is highly important to the entire national banking system that this Court define adequately what is meant by "value" in dissent situations under the National Bank Act and the type of evidence that may be received in the ascertainment of that value.

While no statistical information on this point is readily available, we believe the practice of national bank trust departments holding their own shares in trust is quite common. That such a practice has Congressional recognition and acceptance is shown by 12 USC 61, which

makes special provisions for the voting of shares so held. Thus, it appears that there will be numerous opportunities for a co-trustee, or even a beneficiary, of a trust owning shares of the trustee bank to provoke a dissent from a merger or consolidation. To the extent that such opportunities exist, the decision below creates an unhealthy incentive toward dissents, by providing a precedent for superimposing additional "values" on those fixed by the Comptroller, as well as by providing an unsound precedent for the standard of valuation.

The importance to our nation of the integrity of our system of national banks cannot be doubted. This Court has repeatedly recognized that the National Bank Act contains a complete system for the establishment and regulation of national banks. *E.g.*, *Cook County National Bank* v. *United States*, 107 U.S. 445, 27 L. Ed. 537 (1883); *Deitrick* v. *Greaney*, 309 U.S. 190, 84 L. Ed. 694, *reh. denied*, 309 U.S. 697, 84 L. Ed. 1036 (1940).

The Comptroller has been given extensive authority to regulate the activities of national banks and to examine their books and records, including those of their trust departments. (*E.g.*, 12 USC 27, 51-60, 92a, 161, 191-211, 214-215b, 481, 1814.) These statutes, and the regulations promulgated by the Comptroller under the authority thereof, undoubtedly control, even in the face of state law. *Franklin National Bank* v. *New York*, 347 U.S. 373, 98 L. Ed. 767 (1954).

The federal statutes regulating mergers and consolidations of national banks were designed to protect both the banking associations and their shareholders. *Central-Penn National Bank* v. *Portner*, 201 F.2d 607, 609 (3rd Cir. 1953) *cert. denied*, 346 U.S. 815. It is clear that the "value" fixed by the Comptroller should fully protect shareholders who are dissatisfied with the merger. How-

ever, the capital of the continuing national banks could be seriously impaired if state tribunals are permitted to require them, on state law principles, to pay dissenters a "value" greatly in excess of the market value of the shares at the time of the merger. *Central-Penn, supra*, at footnote 4; 201 F. 2d at p. 609.

b. Federal Law Must Control

It is axiomatic that federal law, specifically the National Bank Act, must be given controlling effect in this case. *Franklin Nat. Bk.* v. *New York*, 347 U.S. 373, 98 L. Ed. 767 (1954); *Nash* v. *Florida Industrial Commission*, 389 U.S. 235, 19 L. Ed.2d 438 (1967). The Alabama Court has attempted to avoid the effect of the relevant provisions of the National Bank Act by grounding its affirmance of additional liability on the trust relationship that existed between BTNB and this particular dissenter. In the final analysis, this conclusion of the Alabama Court is predicated on the alleged failure of BTNB to supply information to the Comptroller, even though it was not requested. However, if an appraisal by the Comptroller is to be "final and binding," the processes by which he makes the appraisal must be within his sole control. Certainly, it destroys the "final and binding" effect if an extra value can be superimposed on that fixed by the Comptroller because procedures considered necessary by a state court, but not by the Comptroller, were not followed.

We recognize that national banks are subject to state law, except where it conflicts with the purpose of federal laws or renders them ineffective. *Anderson National Bank* v. *Luckett*, 321 U.S. 233, 88 L. Ed. 692 (1944); *Lewis* v. *Fidelity & Deposit Co.*, 292 U.S. 559, 78 L. Ed. 1425 (1934). However, the present case is one where state law has been permitted by the Alabama Court to subvert the purpose

of federal law and to render it ineffective. This was pointed out forcefully by the Justices of the Alabama Supreme Court who filed dissenting opinions. [See App. pp. 90-100; 295 Ala. at p. 55-7, 322 So.2d at p. 703-5 (1975 decision) and App. pp. 60-61; 371 So.2d at p. 898 (1979 decision).]

This Court certainly is not bound by the Alabama Court's characterization of its holding. *First Agricultural National Bank* v. *State Tax Commission*, 392 U.S. 339, 20 L. Ed. 2d 1138 (1968); *Society For Savings, etc.* v. *Bowers*, 349 U.S. 143, 99 L. Ed. 950 (1955). Nor is this Court bound by a complaining party's characterization of his complaint. *Whitney National Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 13 L. Ed. 2d 386 (1965). In the present case it is clear that the gravamen of the complaint on behalf of the Trust is not the quality of BTNB's performance as co-trustee, but the supposedly inadequate amount fixed by the Comptroller in his appraisal. The lack of substance to the charges that BTNB failed in its obligation to furnish information to the Comptroller for use in his appraisal is demonstrated by the following facts, all of which are clear in the record:

1. In the first trial, the only criticism was BTNB's failure to furnish reports of "internal audits." This charge was effectively abandoned in the second trial.[4]

2. The ultimate finding of liability is predicated on BTNB's failure to submit projections of future earnings, dividends and growth prospects. No such obligation on the part of the bank had ever been suggested prior to the second trial. No precedent has been cited to support the existence of any such obligation. Moreover, the trial court's description of

[4]No internal audits were ever introduced in evidence and none of the value witnesses gave any consideration to them. (R. 4413-5, 4660-1, 7151-4)

what BTNB should have submitted to the Comptroller, in order to discharge its supposed duty as a trustee, is so vague as to be virtually meaningless. (See p. 10-11, *supra*.)

3. The value witnesses called by the temporary trustee (whose conclusions provide the only support for the trial court's finding that the stock had a value of $50 per share at December 31, 1968) admittedly did not rely on any information about BTNB's financial condition that was not also considered by the Comptroller, except information for periods subsequent to the merger. (R. 4514-8, 4660-1, 7151-4.)

The holding of the Alabama Court thus presents an intriguing question concerning the interrelationship of state and federal law. In the courts below, contrary to the Supremacy Clause of the United States Constitution (Article VI), a strained application of state common law doctrines relating to conflict of interest of trustees has been allowed to prevail over the plain language of a section of the National Bank Act setting out comprehensive procedures for the merger of national banks and providing in detail for the rights and obligations of the bank and dissenting shareholders. This clearly erroneous decision should not be permitted to stand!

c. Comptroler's Appraisal Must be Given "Final and Binding" Effect

In one sense the courts below have not attempted to "review" the Comptroller's appraisal. Rather, they have ignored it and, in a *de novo* proceeding in a state court, imposed a substitute determination of their own. However, the effect of their decisions is the same as if they had reviewed the Comptroller's appraisal, found it erroneous and entered a judgment reversing the Comptroller.

We acknowledge the presumption favoring the availability of judicial review of administrative decisions. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 18 L. Ed. 2d 681 (1967). Nevertheless, it is well established that, subject only to constitutional limitations, Congress does have the power to foreclose judicial review of administrative determinations and, where the intent of Congress to do so is clear, this intent must be given effect. *Morris* v. *Gressette*, 432 U.S. 491, 53 L. Ed. 2d 506 (1977); *Switchmen's Union of N.A.* v. *National Mediation Board*, 320 U.S. 297, 88 L. Ed. 61 (1943). No constitutional ground has been suggested for avoiding the Comptroller's appraisal in this case.

We have found nothing in the legislative history of 12 USC 215a that sheds any light on Congress' intention concerning judicial review of an appraisal by the Comptroller. However, the language of 12 USC 215a(c) and (d), providing in each of those subsections that the Comptroller's appraisal "shall be final and binding on all parties," is plain enough. *Union Pacific R. Co* v. *Price*, 360 U.S. 601, 3 L. Ed. 2d 1460 (1959). Moreover, it is entirely consistent with the broad supervisory powers given the Comptroller over national banks that Congress would also intend that the Comptroller have the final say on this question of valuation.

It is not uncommon, in the federal regulatory pattern, for Congress to commit to final agency determination questions of valuation that are not reviewable by the courts, at least where the agency's findings are reached with material evidence to support them and in accordance with legal standards. *Central Illinois Securities Corp.* v. *Securities and Exchange Commission*, 338 U.S. 96, 125-6, 93 L. Ed. 1837, 1861-2 (1949) (utility holding company simplification plan); *Ecker* v. *Western Pac. R. Corp.*, 318

U.S. 448, 473, 87 L. Ed. 892, 932 (1943) (railroad reorganization). No one acting for the Trustee has ever claimed that the Comptroller lacked evidence to support his appraisal or that his conclusion was not reached in accordance with legal standards.[5]

If the word "final" stood alone in 12 USC 215a(c) and (d), it could be said to have meanings that are not inconsistent with subsequent judicial review, *Heikkila* v. *Barber*, 345 U.S. 229, 97 L. Ed. 972, *reh. denied*, 345 U.S. 946, 97 L. Ed. 1371 (1953); however, the more positive phrasing of "final and binding on all parties" can hardly be read to have any meaning other than one which forecloses subsequent review by the courts. *C.f., Union Pacific R. Co.* v. *Price*, 360 U.S. 601, 3 L. Ed. 2d 1460 (1959) ("final and binding"); *Tooahnippah* v. *Hickel*, 397 U.S. 598, 25 L. Ed. 2d 600 (1970) ("final and conclusive"); *First Moon* v. *White Tail*, 270 U.S. 243, 70 L. Ed. 565 (1926) ("final and conclusive").

d. Collateral Attack is Improper in Any Event

If an appraisal by the Comptroller can be subjected to judicial review, it is not conceivable that this can properly be done in a collateral proceeding to which the Comptroller has not been made a party. *Lincoln Bank & Trust Co.* v. *Exchange Nat. Bank & Trust Co.*, 383 F.2d 694, 700 (10th Cir. 1967).

Through the efforts of the separate counsel engaged by Mr. Henley, the Trust entered an "appearance" in the

[5]No attempt was made, in either trial, to attack the reasonableness of the Comptroller's appraisal on the record before him. Indeed, the Comptroller's appraisal file was not in evidence at the first trial, although BTNB did introduce it at the second trial. (BTNB Ex. 122) The only value witness called by the temporary trustee who had seen the Comptroller's appraisal file when he testified conceded that the stock may have been fairly valued by the Comptroller. (R. 7222) As noted earlier, the Comptroller's appraisal was above the market. (See p. 7, *supra*.)

appraisal proceedings before the Comptroller by requesting, and being allowed, time to submit information relevant to the valuation question. (BTNB Ex. 122) However, the Trust thereafter expressly waived the opportunity to make any such submittal. (BTNB Ex. 122) After the appraisal was announced, Mr. Henley not only accepted payment of the appraised value on behalf of the Trust (RX-1), he also made no effort to seek any direct review of the Comptroller's determination of value.

Instead, many months later, in a totally separate proceeding to which the Comptroller was not a party, he was permitted to raise an issue with respect to the adequacy of the Comptroller's appraisal, asserting that the amount fixed by the Comptroller was less than the fair value of the shares he had surrendered on behalf of the Trust.

Such a delayed collateral attack in a state court should not be permitted to undermine the Comptroller's determination, *Whitney National Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 13 L. Ed. 2d 386 (1965); *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 2 L. Ed. 2d 1345 (1958), especially in view of the Congressional directive that the Comptroller's appraisal is to be "final and binding on all parties."

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Alabama.

Respectfully submitted,

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APPENDIX

A. STATUTORY PROVISIONS

12 U.S.C. 215a.—(a) One or more national banking associations or one or more State banks, with the approval of the Comptroller, under an agreement not inconsistent with sections 215-215b of this title, may merge into a national banking association located within the same State, under the charter of the receiving association. The merger agreement shall—

(1) be agreed upon in writing by a majority of the board of directors of each association or State bank participating in the plan of merger;

(2) be ratified and confirmed by the affirmative vote of the shareholders of each such association or State bank owning at least two-thirds of its capital stock outstanding, or by a greater proportion of such capital stock in the case of a State bank if the laws of the State where it is organized so require, at a meeting to be held on the call of the directors, after publishing notice of the time, place, and object of the meeting for four consecutive weeks in a newspaper of general circulation published in the place where the association or State bank is located, or, if there is no such newspaper, then in the newspaper of general circulation published nearest thereto, and after sending such notice to each shareholder of record by certified or registered mail at least ten days prior to the meeting, except to those shareholders who specifically vaive notice, but any additional notice shall be given to the shareholders of such State bank which may be required by the laws of the State where it is organized. Publication of notice may be waived, in cases where the Comptroller determines that an emergency exists justifying such waiver,

by unanimous action of the shareholders of the association or State bank;

(3) specify the amount of the capital stock of the receiving association, which shall not be less than that required under existing law for the organization of a national bank in the place in which it is located and which will be outstanding upon completion of the merger, the amount of stock (if any) to be allocated, and cash (if any) to be paid, to the shareholders of the association or State bank being merged into the receiving association; and

(4) provide that the receiving association shall be liable for all liabilities of the association or State bank being merged into the receiving association.

(b) If a merger shall be voted for at the called meetings by the necessary majorities of the shareholders of each association or State bank participating in the plan of merger, and thereafter the merger shall be approved by the Comptroller, any shareholder of any association or State bank to be merged into the receiving association who has voted against such merger at the meeting of the association or bank of which he is a stockholder or has given notice in writing at or prior to such meeting to the presiding officer that he dissents from the plan of merger, shall be entitled to receive the value of the shares so held by him when such merger shall be approved by the Comptroller upon written request made to the receiving association at any time before thirty days after the date of consummation of the merger, accompanied by the surrender of his stock certificates.

(c) The value of the shares of any dissenting shareholder shall be ascertained, as of the effective date of the merger, by an appraisal made by a committee of three

persons, composed of (1) one selected by the vote of the holders of the majority of the stock, the owners of which are entitled to payment in cash; (2) one selected by the directors of the receiving association; and (3) one selected by the two so selected. The valuation agreed upon by any two of the three appraisers shall govern. If the value so fixed shall not be satisfactory to any dissenting shareholder who has requested payment, that shareholder may, within five days after being notified of the appraised value of his shares, appeal to the Comptroller, who shall cause a reappraisal to be made which shall be final and binding as to the value of the shares of the appellant.

(d) If, within ninety days from the date of consummation of the merger, for any reason one or more of the appraisers is not selected as herein provided, or the appraisers fail to determine the value of such shares, the Comptroller shall upon written request of any interested party cause an appraisal to be made which shall be final and binding on all parties. The expenses of the Comptroller in making the reappraisal or the appraisal, as the case may be, shall be paid by the receiving association. The value of the shares ascertained shall be promptly paid to the dissenting shareholders by the receiving association. The shares of stock of the receiving association which would have been delivered to such dissenting shareholders had they not requested payment shall be sold by the receiving association at an advertised public auction, and the receiving association shall have the right to purchase any of such shares at such public auction, if it is the highest bidder therefor, for the purpose of reselling such shares within thirty days thereafter to such person or persons and at such price not less than par as its board of directors by resolution may determine. If the shares are sold at public auction at a price greater than

the amount paid to the dissenting shareholders, the excess in such sale price shall be paid to such dissenting shareholders. The appraisal of such shares of stock in any State bank shall be determined in the manner prescribed by the law of the State in such cases, rather than as provided in this section, if such provision is made in the State law; and no such merger shall be in contravention of the law of the State under which such bank is incorporated. The provisions of this subsection shall apply only to shareholders of (and stock owned by them in) a bank or association being merged into the receiving association.

(e) The corporate existence of each of the merging banks or banking associations participating in such merger shall be merged into and continued in the receiving association and such receiving association shall be deemed to be the same corporation as each bank or banking association participating in the merger. All rights, franchises, and interests of the individual merging banks or banking associations in and to every type of property (real, personal, and mixed) and choses in action shall be transferred to and vested in the receiving association by virtue of such merger without any deed or other transfer. The receiving association, upon the merger and without any order or other action on the part of any court or otherwise, shall hold and enjoy all rights of property, franchises, and interests, including appointments, designations, and nominations, and all other rights and interests as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, and committee of estates of lunatics, and in every other fiduciary capacity, in the same manner and to the same extent as such rights, franchises, and interests were held or enjoyed by any one of the merging banks or banking

associations at the time of the merger, subject to the conditions hereinafter provided.

(f) Where any merging bank or banking association, at the time of the merger, was acting under appointment of any court as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, or committee of estates of lunatics, or in any other fiduciary capacity, the receiving association shall be subject to removal by a court of competent jurisdiction in the same manner and to the same extent as was such merging bank or banking association prior to the merger. Nothing contained in this section shall be considered to impair in any manner the right of any court to remove the receiving association and to appoint in lieu thereof a substitute trustee, executor, or other fiduciary, except that such right shall not be exercised in such a manner as to discriminate against national banking associations, nor shall any receiving association be removed solely because of the fact that it is a national banking association.

(g) Stock of the receiving association may be issued as provided by the terms of the merger agreement, free from any preemptive rights of the shareholders of the respective merging banks.

B. OPINIONS AND ORDERS BELOW

371 So.2d 883
BIRMINGHAM TRUST NATIONAL BANK et al.

v.

John C. HENLEY, III, et al.

Charles A. GRADDICK, Attorney General

v.

BIRMINGHAM TRUST NATIONAL BANK et al.

John C. HENLEY, III

v.

BIRMINGHAM TRUST NATIONAL BANK et al.

77-382, 77-382A and 77-382B.

Supreme Court of Alabama.

April 6, 1979.

Rehearing Denied June 8, 1979.

SHORES, Justice.

This is the second appeal in this case. See *Henley v. Birmingham Trust National Bank,* 295 Ala. 38, 322 So.2d 688 (1975).

For convenience, we reiterate the salient facts:

The Linn-Henley Charitable Trust was created by the

will of Walter E. Henley, a former president and chairman of Birmingham Trust National Bank (BTNB), who died in December, 1961. His will named BTNB, or its successors, and his nephew John C. Henley, III, joint executors of his will and joint trustees of the Trust. BTNB and Mr. Henley served as joint executors from December, 1961, until July, 1965, when administration of the estate was terminated. The executors were then discharged following a final accounting and the Trust was funded. BTNB and Mr. Henley continued serving as joint trustees of the Trust down to the present. Potential beneficiaries of the Trust, to be selected by the joint trustees, are limited to:

> " . . . any corporation or organization organized and operated exclusively for religious, charitable, scientific, literary or educational purposes . . .
>
> " . . .
>
> " . . . whose activities are exclusively within the geographical limits of Jefferson County, Alabama, or . . . which maintain branch operations within Jefferson County [but any amounts distributed to the latter] . . . must be expended . . . within Jefferson County . . . "

Assets of the estate of Walter E. Henley consisted almost entirely of bank stocks, a major portion of which was stock of BTNB. These stocks became the initial "inherited" assets of the Trust. As a result of various splits and dividends, the Trust owned 27,460 shares of BTNB stock in 1968.

In the fall of 1968, management of BTNB decided to form a one-bank holding company. The reorganization plan involved (a) formation of a new national bank, 100% of the stock of which was held by a Delaware business

corporation, also newly formed, and (b) merger of the existing bank into the newly formed bank with the holding company issuing its stock, in a one-for-one exchange, to replace stock of the existing bank. The merger phase of the reorganization plan was governed by provisions of the National Bank Act, 12 U.S.C. § 215a. One effect of this method of reorganization was that all stock of the surviving national bank (except directors' qualifying shares) would be owned by the holding company and the only stock available to the public would be stock of the holding company.

A stockholder vote was held on November 19, 1968, resulting in approval of the proposed reorganization by holders of more than 80% of the outstanding stock of the old bank. The Comptroller of the Currency (the federal official charged with supervision of national banks) gave his approval on November 25, 1968. The reorganization became effective December 31, 1968.

Henley opposed the merger/reorganization and decided it would be in the interest of the Trust to have the Trust dissent from the merger. The rights of dissenting stockholders are contained in the provisions of 12 U.S.C. § 215a, supra. Basically, the dissent procedure calls for surrender of the stockholders' shares followed by an appraisal to determine their value. There is provision for the parties to appoint appraisers but, if for any reason the appraisal is not completed within 90 days, either party may call on the Comptroller to appraise the stock surrendered by the dissenter. The statute provides that the Comptroller's appraisal shall be final and binding on all parties. The national bank that survives the merger is required to pay dissenters for their stock at the appraised value. The final step in the dissent process requires the continuing national bank to sell at public auction the

stock which would have been delivered to the dissenting stockholders had they not dissented. The continuing bank is expressly permitted to buy the stock offered at this auction but, if it does, it must dispose of the stock in some manner within 30 days. If the auction sale of the stock "that would have been delivered" brings more than the appraised value of the shares surrendered, the excess over the appraised value is paid to the dissenters.

No appraisal having been theretofore accomplished, BTNB, on September 23, 1969, wrote to the Comptroller asking him to appraise the stock of the Trust that had been surrendered in connection with the dissent.

On January 21, 1970, the Comptroller reported his appraisal, finding that, at the effective date of the merger, which was December 31, 1968, the stock of "old" BTNB had a value of $32.80 per share, making a total value of $900,688 for the 27,460 shares. This amount was paid by the "new" BTNB to the Trust and accepted by Mr. Henley on behalf of the Trust. The "old" BTNB stock was surrendered at this time. This appraisal by the Comptroller was somewhat above the market. The market price on December 31, 1968, was 30 bid, 31 asked. In the trial it was accepted that the market price was 30½.

After making this payment, BTNB proceeded to hold an auction sale, as required by 12 U.S.C. § 215a(d). With the approval of the Comptroller, the Bank first advertised an auction for 27,460 shares of the holding company stock, to be held on February 10, 1970. Shortly before the date advertised for this sale, Henley objected, pointing out that 12 U.S.C. § 215a(d), supra, required that stock of the "receiving association" be offered at auction and contending that this meant the stock of the continuing national bank. Before the first auction, Mr. Henley delivered to one of the trust officers of the bank a letter in which he said:

" . . . Inasmuch as there is in my opinion a real likelihood that the proposed sale will not attract bids in line with the true value of the stock, I invite the Birmingham Trust National Bank as Co-Trustee for the Linn-Henley Charitable Trust to join me in bidding at the sale and to purchase as many shares of common stock of BTNB Corporation as can be purchased at a price not exceeding $23.25 per share, *the last quoted bid price for such stock*. . . . You are in a unique position to know the value of the BTNB Corporation stock offered for sale and I believe you would agree that if the same can be purchased for $23.25 or less per share it would be a good investment for the Trust. . . . " (Emphasis Added)

The Bank declined to join Henley in purchasing or bidding for the holding company stock on behalf of the Trust. The only bid for the stock offered was made by the holding company. It purchased 27,460 shares of its own stock at $26 per share.

Being uncertain that the proper stock had been auctioned to satisfy 12 U.S.C. § 215a(d), supra, BTNB held a *second* auction, at which 27,460 shares of the *continuing national bank* were advertised and sold on March 6, 1970. Again, the only bid was made by the holding company, this time at $24 per share. Since neither auction produced a bid in excess of $32.80 per share, there was no further payment by BTNB to the Trust as a result of these auctions (12 U.S.C. § 215a(d), supra).

On the first appeal, Henley contended that BTNB had breached its duty to the Trust in several respects. A plurality of this court concurred to reverse the cause to the trial court to:

"1. Appoint a Temporary Trustee of the Trust Estate in

lieu of the named co-trustees for the sole and limited purpose of the retrial of this cause.

"2. Upon resubmission of this cause, make the following specific findings of fact and conclusions:

"(a) Determine what data should, and except for the conflict of interests of the co-trustee—BTNB—would, have been made available to the Comptroller; and, from such data, fix the value of the 'old' bank stock as of the time such ascertainment is contemplated by the Federal Act. If the value as fixed is more than the value fixed by the Comptroller, award to the Trust as damages the sum equal to the difference against BTNB.

"(b) In which latter event (if the fixed value per share exceeds $32.80), determine the true bid value of the 'new' bank stock had BTNB, absent its conflict of interests, actively sought potential bidders as of the time of the public auction as provided by the Federal Act. If the bid value so fixed is higher than the ascertained value of the stock as fixed under (a) above, award to the Trust as additional damages the sum equal to such difference against BTNB.

"(c) If the ascertained value of the 'old' bank stock is less than $32.80 per share, but the per share auction value as fixed under (b) above exceeds $32.80, award to the Trust as damages the sum equal to the aggregate of the difference between such per share auction value and $32.80 against BTNB.

It is suggested that the price obtained by BTNB upon resale of the 'new' stock within the 30-day period following the auction, as prescribed by § 215a(d), is relevant data (subject, of course, to any admissible evidence of price variance) for consideration in making such determination.

"(d) Determine whether the ascertainable true value of Birmingham Realty stock and the asking price therefor of the 'N.Y. block,' along with the other material factors, rendered BTNB's conflict of interests responsible for an abuse of discretion in refusing to agree to such purchase. If so, award to the Trust as damages such sum as the Court may deem reasonable and adequate to make the Trust whole in light of all competent evidence adduced on this issue.

"(e) Determine whether BTNB's evidenced conflict of interests is so inherent in the nature of its relationship to the Trust and to the Co-trustee Henley as to render BTNB disqualified to further serve as co-trustee to the instant Trust Estate; or, whether the resolution of the instant controversy will so dissolve the conflict of interests as to render BTNB fully competent and qualified to serve as co-trustee; and to implement by order of the Court such determination as the interest of the Trust Estate may require.

"3. Determination and award of expenses and fees chargeable against the Trust Estate shall be limited to those reasonably and necessarily incurred by the Temporary Trustee and his attorney." (295 Ala. at 48, 49, 322 So.2d 696—697)

On remand, the trial court appointed a temporary trustee and approved his employment of counsel to retry the case. After a trial which lasted six weeks, the court entered the following final decree:

"FINAL DECREE

"This cause came on for trial on the merits, following remand thereof by the Supreme Court of Alabama, and was submitted to the Court upon pleadings and proof

after more than six weeks of trial time. Counsel appearing for the parties were as follows:

"Morris K. Sirote and Jack E. Held, attorneys for the Temporary Trustee; Lee C. Bradley, Jr. and MacBeth Wagnon Jr., attorneys for BTNB and the Holding Company; Donald E. Sweeney, Jr. and James W. May, Jr., attorneys for the individual Co-Trustee, John C. Henley, III; Julian L. McPhillips, Jr., Barry V. Hutner and Jim O'Kelley each as Assistant Attorneys General, in behalf of the Beneficiaries of the Trust Estate. The participation by the Attorney General in this cause has been active and continual from the outset until the present. Testimony of witnesses was received by the Court ore tenus and without a jury. Comprehensive post-trial and pre-trial briefs and letters which treated all possible subjects evident in the controversy were received and studied by the Court. The post-trial briefs and letters were accompanied by suggested decrees as prepared by the separate parties. The Court has duly considered all of the pleadings, written documents and exhibits filed in this cause, and all evidence and the briefs, letters and arguments of counsel, along with the data contained in the suggested decrees filed by all parties to this cause. Because it is believed by this Court that all of the contentions and authorities of all of the parties are fully expressed through these several documents all of this proffered material is expressly incorporated into and made a part of the record of this case for the edification of any reviewing Court.

"This Court finds that the findings of fact set forth in the suggested decree as filed by the attorneys for the Temporary Trustee are consistent with this opinion, and are fully supported by the overwhelming weight of the evidence. The Court is in agreement therewith, adopts

the same as its own findings of facts and incorporates the same herein by reference.

"This Court will deal with the specific instructions set forth in Syllabus (14) 1, 2(a)(b)(c)(d) and (e) of its opinion seriatim, and will base its orders in response to these instructions and will not depart from the orbit of their content. Some new issues and theories have been raised by the pleadings, but this Court, as stated, will confine itself to the express mandate of the Supreme Court as contained in its opinion of remand, except as to such other issues which are consistent therewith and have not been foreclosed thereby. All motions of the parties not heretofore ruled upon are hereby overruled.

"In accordance with the directions of the Supreme Court, the Court makes the following specific findings of fact and conclusions in the order indicated:

"1. The direction to appoint a 'Temporary Trustee of the Trust Estate in lieu of the named Co-Trustees for the sole and limited purpose of the re-trial of this cause' has been complied with in the appointment of Jack H. Harrison, as the Temporary Trustee of the Linn-Henley Charitable Trust.

"2(a). Based upon the overwhelming weight of the evidence, 'the Court has determined what data should, and except for the conflict of interest of the Co-Trustee—BTNB—would have been made available to the Comptroller; and, from such data, (fixes) the value of the "Old" Bank stock as of the time such ascertainment is contemplated by the Federal Act,' as hereinafter set forth in the decretal portion of this decree. Since this fixed value is more than the value fixed by the Comptroller, this decree will, in compliance with the directions of the Supreme Court, award to the Trust as damages a sum equal to the difference between the actual, fair and intrinsic value of the 'Old' Bank stock surrendered by the Trust following the effective date of the Merger and the value thereof as determined by the Comptroller of the Currency.

"In further compliance with the mandate of the Supreme Court, the Court finds and determines that the following data should, and except for the conflict of interest of the Co-Trustee—BTNB—would have been made available to the Comptroller of the Currency.

"(1) All facts which were known to, or which could have been ascertained by BTNB, as of the effective date of the Merger, showing or reflecting the actual, intrinsic or fair value of the 'Old' Bank stock as of December 31, 1968, appraising all material factors and elements affecting such value, on the basis that BTNB will continue as a going concern, including the nature and extent of its business and its operations, assets, good will, liabilities, earning capacity, investment value and market value of its stock, the earnings of the 'Old' Bank in the past and the regularity of the payment of dividends as well as the future prospects and the growth potential of the bank; an estimate of its future earnings and payment of dividends, and of the expected growth of the bank in earnings and dividends for the future; including an estimate of the dividends expected to be paid by the bank during the year 1969;

"(2) The plans and goals which were known, or should have been known to management of BTNB, as of December 31, 1968 for the expansion of its facilities, opening of new branches, expansion of its leadership in the credit card field, the expected international growth for BankAmericard, its plans for the expansion of its computer services; and all other relevant factors which BTNB knew or should have known as of December 31,

1968 showing and indicating that BTNB would enjoy substantial growth in earnings and in payment of dividends in future years, giving due weight to each of the factors entering into a valuation of the stock of the bank on a going concern basis, and exercising in this respect the professional knowledge, skill and business acumen expected of a corporate Co-Trustee, and that diligence and care which a prudent man ordinarily uses in his own concern.

"The Court further finds from the evidence that management of BTNB was highly competent; that on December 31, 1968 it was fully aware of its manifold expansion plans, of its great potential for future growth, and that its income and dividends would be increased in the year 1969 and thereafter, as in fact they were so increased to a very large extent; and that it was incumbent upon BTNB , as Co-Trustee and fiduciary, to furnish the data above enumerated to the Comptroller of the Currency, assuming that it was giving undivided loyalty to the Trust and that it eliminated its own selfish interests conflicting therewith.

"Based upon the foregoing data and all of the evidence introduced in connection therewith, the Court fixes the actual, intrinsic and fair value of the 27,460 shares of the 'Old' Bank stock as surrendered by the Trust as of the time such ascertainment is contemplated by the Federal Act, i. e. December 31, 1968, at FIFTY AND NO/100 DOLLARS ($50.00) per share. The difference between the total value of this stock ($900,688.00), as fixed by the Comptroller of the Currency, and of the total value so fixed by the Court ($1,373,000.00) is FOUR HUNDRED SEVENTY TWO THOUSAND THREE HUNDRED TWELVE AND NO/100 DOLLARS ($472,312.00), to which must be added interest at six percent per annum from January 1, 1969 (the effective date of the Merger)

to September 1, 1977 amounting to the sum of TWO HUNDRED THIRTY THOUSAND NINE HUNDRED SIXTY AND NO/100 DOLLARS ($230,960.00). The addition of these two sums amounts to SEVEN HUNDRED THREE THOUSAND TWO HUNDRED SEVENTY TWO AND NO/100 DOLLARS ($703,272.00) which must be awarded in favor of the Linn-Henley Charitable Trust and against BTNB.

"2(d) & (c). The Court finds that, under the Plan of Reorganization here in question, and under the newly-developed evidence and the law applicable thereto, it clearly appears that BTNB did not provide for the holding of a public auction of the 'New' Bank stock, as provided by the Federal Act; that all such stock, except qualifying shares, were, upon the effective date of the Merger, transferred to and were owned by the 'Holding Company'; and that thereafter the 'New' Bank stock was neither marketable nor tradeable on any market. Additionally, on March 6, 1970, on which date BTNB attempted to have a public auction of this stock, more than 14 months elapsed since the effective date of the Merger. This unduly long delay was occasioned by the breach of fiduciary duty on the part of BTNB in improperly engaging in a struggle with the individual Co-Trustee, Henley, as to his right to dissent in behalf of the Trust from the Merger. In the meantime, however, the local market on bank stocks became greatly depressed.

"Accordingly, the Court further finds that BTNB made it impossible to hold a legal, realistic or meaningful public auction of the 'New' Bank stock, as required by the Federal Act, and that the public auction of this stock purportedly held by BTNB on March 6, 1970, aside from the fact that BTNB failed to actively solicit bidders at this auction, was totally ineffectual. For these reasons the mandatory instruction by the Supreme Court to de-

termine the true bid value of the 'New' Bank stock, had BTNB, absent its conflict of interest, actively sought potential bidders as of the time of the public auction, as provided by the Federal Act, cannot, in the fact [sic] of the newly-developed evidence introduced by the Temporary Trustee, be effected by this Court.

"The Court further finds that, in the light of the newly-developed evidence adduced on the re-trial of this cause, and the legal theories advanced by the Temporary Trustee, that it was legally prohibitive and otherwise completely impracticable for BTNB to hold a realistic and meaningful public auction, in accordance with the requirements of the Federal Banking Act, of *unregistered* stock of the 'Holding Company' on February 10, 1970, after a similar undue delay following the effective date of the Merger. For these reasons also the mandate of the Supreme Court under 2(b) and (c) above, even if it can be construed to apply to the public auction of the 'Holding Company' stock, as well as to the 'New' Bank stock, cannot be effected by this Court.

"Prior to the auction of the Holding Company stock, however, the Co-Trustee-Henley, advised BTNB, as corporate Co-Trustee, that it was to the apparent and best interests of the Trust that, in the light of all the circumstances then existing, the Trust itself should bid upon and purchase this stock at the public auction, and requested that BTNB concur in this advice. At the auction, BTNB ignored Henley's advice and request and collaborated with the 'Holding Company' in permitting it to be the sole bidder and purchaser of this stock.

"The Court further finds that such self-dealing on the part of BTNB, in collaboration with its affiliate, constitutes a separate, distinct and independent breach of trust on the part of BTNB which arises out of the same operative facts and the conflict of interests referred to by the Supreme Court in 2(b) and (c) above. Accordingly, the Court further finds that the claim for damages arising therefrom, as now presented and developed by the Temporary Trustee, is not inconsistent with anything determined by the Supreme Court under 2(b) and (c) and is so closely connected therewith, that this Court, especially under the New Alabama Rules of Court, may take cognizance thereof.

"The Court further finds from the evidence that Henley exercised sound judgment and prudence in seeking to protect the Trust against the inefficacious public auctions by suggesting that the Trust purchase this stock at the then depressed market prices, and that BTNB abused its discretion in failing to concur in the recommendations of Henley. Additionally, the Court finds that BTNB failed to resolve its conflict of interests either by petitioning this Court for instructions or by subordinating its own interests in favor of the Trust. By thus competing with the Trust and engaging in self dealing, in and about the administration of this Trust, BTNB was guilty of an even more flagrant breach of fiduciary duty than the failure to actively seek potential bidders as of the time of the public auctions referred to by the Supreme Court in 2(b) and (c) above.

"The Court further finds that the 'Holding Company' in purchasing the 27,460 shares of its stock at the public auction in question willfully and knowingly participated in the violation of the fiduciary duty on the part of BTNB, with full knowledge of such breach on the part of BTNB, and that both BTNB and the 'Holding Company' are liable to the Trust for the profits accruing to them upon the purchase of this stock to the extent of the difference between the bid price of $26 per share made by the 'Holding Company' and the highest intermediate

value of said stock up to the date of trial of $70 per share, and that both BTNB and the 'Holding Company' are liable to the Trust for such profits amounting to the total sum of $1,208,240.00.

"2(d). This Court, from the overwhelming weight of the evidence, finds, relative to 2(d) that the ascertainable true value of Birmingham Realty stock and the asking price therefor of the 'N.Y. Block', along with the other evident material factors, rendered BTNB's conflict of interests responsible for an abuse of discretion in refusing to agree to the purchase of that stock by the Trust. The unwarranted self-interest of BTNB in refusing this purchase resulted in the loss of a highly profitable investment for the Trust. The soundness of this investment for the Trust as a long-term investment should have been, in the exercise of due diligence and care, apparent to BTNB.

"The Court further finds that at the time the individual Co-Trustee proposed to BTNB that the 554 shares of Birmingham Realty Company stock be purchased by the Trust, the underlying value thereof was easily ascertainable and that the actual, intrinsic value of this stock at such time was approximately $2,000 a share; and that the assets of the Realty Company then consisted largely of land holdings, most of which were acquired many years ago at very low costs and were carried on its books at 1913 values, and that even at cost the company had a *book value* of $991.00 per share; that the current market price of the stock was $700.00 per share, and that it was common knowledge in the local business community that the market price was undervalued and did not reflect the true asset values.

"The Court further concludes and finds that, as tentatively concluded by the Supreme Court, all the reasons

assigned by BTNB when taken together, and fully analyzed, 'are but supportive of the conslusions stated in the Trust Officer's testimony, and demonstrate the legal conclusiveness of the conflict of interest on behalf of BTNB with respect to the transaction.' The Court further concludes and finds that the principal reasons which motivated the bank in refusing to consent to the purchase of this block of stock are those testified to by its Trust Officer whose testimony was reintroduced on this re-trial and stands unimpeached.

"As a proximate consequence thereof, the Trust sustained a loss in the sum of $939,500.00, represented by the difference between the sum of $650.00 per share for which such stock could and should have been purchased and its actual value, amounting to the sum of $2,400.00 per share, which the Trust could have secured as a result of the tender offer to its stockholders made by the Birmingham Realty Company on or about May 1976.

"The Court further finds that BTNB's evidenced conflict of interest is so inherent in the nature of its relationship to the Trust and to the Co-Trustee, Henley, as to render BTNB unable to further serve as Co-Trustee to the instant Trust Estate; and that the resolution of the instant controversy will not dissolve this conflict of interest so as to render BTNB fully competent and qualified to continue to thusly serve as Co-Trustee.

"Accordingly, it is CONSIDERED, ORDERED, ADJUDGED and DECREED by the Court as follows:

"ONE. That the Linn-Henley Charitable Trust shall have and recover of Birmingham Trust National Bank the sum of FOUR HUNDRED SEVENTY TWO THOUSAND THREE HUNDRED TWELVE AND NO/100 DOLLARS ($472,312.00), together with interest thereon at the rate of six percent per annum from

January 1, 1969 to September 1, 1977, amounting to the sum of TWO HUNDRED THIRTY THOUSAND NINE HUNDRED SIXTY AND NO/100 DOLLARS ($230,960.00), or the total sum of SEVEN HUNDRED THREE THOUSAND TWO HUNDRED SEVENTY TWO AND NO/100 DOLLARS ($703,272.00), the same representing the difference between the actual, intrinsic value of the 'Old' Bank stock and the value determined by the Comptroller of the Currency, pursuant to the directions of the Supreme Court, together with the costs of litigation and a reasonable attorneys' fee, attributable to this claim, which the Court hereby reserves for future determination to be made upon application of the parties for reimbursement of such costs and expenses, including attorneys' fees.

"TWO: It is further ORDERED, ADJUDGED and DECREED by the Court that the Linn-Henley Charitable Trust shall have and recover of the Counter-Defendants, Birmingham Trust National Bank and Southern Bancorporation of Alabama the sum of ONE MILLION TWO HUNDRED EIGHT THOUSAND TWO HUNDRED FORTY AND NO/100 DOLLARS ($1,208,240.00), the same representing the profits accruing upon the 'Holding Company' stock to the Counter-Defendants acquired by them at the public auction held on February 10, 1970.

"THREE: It is further ORDERED, ADJUDGED and DECREED that the Linn-Henley Charitable Trust shall have and recover of the Counter-Defendant, Birmingham Trust National Bank, the sum of NINE HUNDRED SIXTY NINE THOUSAND FIVE HUNDRED AND NO/100 DOLLARS ($969,500.00), the same representing the profits lost to the Trust by virtue of the breaches of its fiduciary duties in failing to concur with the individual Co-Trustee in the purchase of the 554 shares of stock of Birmingham Realty Company.

"FOUR: It is further ORDERED, ADJUDGED and DECREED that Birmingham Trust National Bank is hereby removed and discharged as Trustee for the Linn-Henley Charitable Trust. In the place and stead of BTNB, The First National Bank of Birmingham is hereby named as Trustee of the Linn-Henley Charitable Trust upon its acceptance of this nomination and appointment.

"FIVE: It is further ORDERED, ADJUDGED and DECREED that all costs of litigation, including reasonable attorneys' fees applicable to the establishment of liability to the 'Old Bank' and its stockholders, and the successor, the 'New Bank' incident to the circulation of the fraudulent or misleading proxy statement, in violation of the securities and other laws, as set out in the additional findings of fact and conclusions of law of the Temporary Trustee made a part hereof, shall be charged against the Counter-Defendant, Birmingham Trust National Bank.

"SIX: The fixing and awarding of attorneys' fees costs of litigation and expenses and compensation to the Temporary Trustee is hereby reserved along with a determination of the question as to whom the said costs, expenses and attorneys' fees shall be charged.

"SEVEN: Counsel for the separate parties, (including the Temporary Trustee), are instructed to furnish to the Court their sworn applications for allowance of fees and expenses which they may claim, along with any supporting affidavits, within 15 days of the date of this instant decree, along with their claims and suggestions as against whom these fees and expenses should be charged; and the Counter-Defendant, BTNB, is hereby taxed with all

taxable costs of this action, for which let execution issue.

"DONE and ORDERED this 4th day of October, 1977.

" /s/ Wm. C. Barber
CIRCUIT JUDGE IN EQUITY
SITTING"

BTNB appealed, claiming error in all aspects of the decree. The attorney general and Henley, as Co-Trustee, cross-appealed from that aspect of the decree which taxed costs and attorneys' fees against the Trust.

At the outset, it should be noted that no party argues that the plan of reorganization adopted by the majority stockholders was made for the purpose of squeezing or freezing out minority stockholders on a cash out basis. In fact, it is not argued that the bank breached its fiduciary duties to minority stockholders. The only contention made is that the bank breached its duty to the Trust in various ways. We shall address these theories in the sequence set out in the remand order in the opinion delivered on the prior appeal.

I.

Did BTNB breach its duty to the Trust by failing to furnish data to the Comptroller of the Currency which would have produced a higher appraisal of the old bank stock than $32.80 per share as originally fixed?

[1] BTNB argues now, as it did on the prior appeal, that the provisions of § 215a(d), Title 12, U.S.C., to the effect that the Comptroller's appraisal "shall be final and binding on all parties" forecloses any question that the appraisal may not have been sufficient in amount. A majority of the court rejected that argument on the prior appeal, holding that if the bank breached its fiduciary duty to the Trust by withholding data which would be

material to the Comptroller in making a valid appraisal, it was answerable to the Trust under state law. We adhere to that position.

It was the opinion of the majority that the language of § 215a(d), making the appraisal final and binding on all parties was not intended by the Congress to preempt state law in the area of fiduciary duties of a national bank serving in a fiduciary position. In fact, the act itself implicitly recognizes the role of state law in this area. § 215a(f) recognizes that a national bank acting as a fiduciary under appointment by a state court is subject to supervision or removal by that court, saying:

> " . . . Nothing contained in this section [215] shall be considered to impair in any manner the right of any court to remove the consolidated national banking association and to appoint in lieu thereof a substitute . . . fiduciary, except that such right shall not be exercised in such a manner as to discriminate against national banking associations, nor shall any consolidated national banking association be removed solely because of the fact that it is a national banking association."

Additionally, the act itself refutes the contention that the appraisal is final and binding on all parties for all purposes. The appraisal is not binding on either party if at the public auction required to be held a price greater than the appraisal is received. In that event, the dissenting stockholder is entitled to receive the amount in excess of the appraisal.

Thus, as we read § 215, state courts are not foreclosed to inquire into the question of breach of fiduciary duty on the part of a national bank or a state bank involved in consolidation and merger as provided for by that act.

[2] On the retrial of this case, the trial court determined that BTNB withheld data from the Comptroller of the Currency which reflected on the actual, intrinsic or fair value of the stock held in trust as of December 31, 1968. Based upon evidence before it, the court determined that the value of the stock was $50 per share as opposed to $32.80 fixed by the appraisal and awarded to the Trust the difference, plus interest from January 1, 1969, to September 1977, for a total award of $703,272.00. We affirm. The cause was remanded for a determination of this issue and there is evidence in the record as shown by the final decree to support the finding. Therefore, we should not disturb this finding by the court.

II.

On remand, the trial court was instructed to award to the Trust the difference in the value as determined by an appraisal (with all pertinent data taken into consideration) and the "true" bid value of the stock at auction, if that amount were higher than the appraisal figure. The trial court conceded its inability to carry out this mandate, and instead awarded to the Trust the difference in the amount paid for the stock by the holding company at the auction, $26 per share, and the highest intermediate value of the stock up to time of trial, $70 per share, for a total of $1,208,240. The theory advanced by the temporary trustee and the basis of this award in the court's decree, was that BTNB breached its duty to the Trust in refusing to purchase the stock for the Trust. Curiously, the temporary trustee pursued this theory even though Henley, on the first trial, argued that BTNB was guilty of a breach of duty in recommending that the Trust accept shares of stock in the new bank holding company in exchange for old bank stock.

The auction is statutorily mandated as a second step in the dissent procedure. It appears to be designed to further protect the rights of stockholders who exercise their right to dissent from the plan of merger or consolidation. If the stock brings a price higher than that for which it was appraised, the dissenting stockholders reap the benefit. The act expressly permits the purchase of the shares by the surviving banking association. The temporary trustee candidly admits that the stock could not possibly have brought a price at the auction in excess of the $32.80 per share which the Trust had been paid based on the appraisal. He obviously concedes, therefore, that it would not have attracted a bid in excess of the $50 per share which the court has now determined was the true appraisal value. Henley, the co-trustee, himself recognized that the stock would not attract bidders at over $32.80 and urged the investment for the Trust only up to a price of $23.25. He and the temporary trustee now contend that the trust is entitled to the difference in the price paid at auction and the highest market price since that time, not because the bid price did not reflect the true value of the stock, but because the bank refused to purchase the stock for the Trust. Admittedly, it now appears that the stock would have been a good investment for the Trust, or for anyone else for that matter. But, the duty of the bank in its relation to the Trust must be measured against circumstances which existed at the time the alleged breach of its fiduciary duty occurred. The bank had a duty to conduct a meaningful public auction of the stock which the dissenting stockholders would have received in exchange for the stock they held but for their election to dissent from the plan of reorganization. The temporary trustee argues that the bank can be charged with breach of this duty by virtue of the plan of reorganization it elected to pursue. It is quite true

that § 215, supra, does not contemplate the exact type of reorganization which management and the majority stockholders of BTNB adopted. That plan has heretofore been set out. It was, therefore, not entirely clear what stock should be offered at the auction, whether the stock of the new national bank or stock of the holding company. To resolve any question about this issue, both were offered. There was no evidence offered and no contention made that the price bid in each instance was not reflective of the fair market price then prevailing. That either stock was being offered at auction was a direct result of Henley as the individual co-trustee having exercised his statutory right to vote the stock held in trust against the plan of reorganization. He had a perfect legal right to so vote those shares. However, nothing in the law imposes liability on BTNB as co-trustee in rejecting Henley's proposal to then purchase as an investment for the Trust the very stock it would have received in exchange for the old stock had Henley not voted those shares against the plan of merger/reorganization. This is so assuming that the stock could have been legally acquired by the co-trustee as an investment for the Trust.

The general definition of a trustee's investment duties was first stated by the Supreme Court of Massachusetts in *Harvard College v. Amory*, 9 Pick. 446, 461, 26 Mass. 446, 461 (1830):

> "All that can be required of a trustee to invest, is, that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested."

The Restatement of the Law of Trusts 2d, § 227 (1959), states the rule in the following language:

> "In making investments of trust funds the trustee is under a duty to the beneficiary
>
> "(a) in the absence of provisions in the terms of the trust or of a statute otherwise providing, to make such investments and only such investments as a prudent man would make of his own property having in view the preservation of the estate and the amount and regularity of the income to be derived. . . ."

[3] The general rule is, absent express authority in the trust instrument, a corporate trustee is guilty of a breach of fiduciary duty where it purchases property which it owns for a trust administered by it. II Scott on Trusts, § 170.13 (3d ed. 1967).

> "Unless authorized to do so by the terms of the trust, or by statute, a corporate trustee cannot, as a general rule, properly make or retain a trust investment in its own stock or bonds. Such a transaction involves self-dealing, or at least, divided loyalty. . . ." (54 Am. Jur., Trusts, § 413)

A regulation to like effect has been adopted by the Comptroller of the Currency binding national banks. 12 C.F.R. § 9.12(a).

In fact, Title 12, § 83, U.S.C., prohibits the purchase or retention by a national bank of its own stock for its own account. This, of course, explains why § 215a(d), although allowing a banking association to purchase the shares of dissenting shareholders at auction, expressly says it may do so only "for the purpose of reselling such shares within 30 days. . . ."

[4, 5] BTNB was a co-trustee of the Linn-Henley

Trust. Multiple trustees must act jointly and in concert and may not delegate to each other or to another powers calling for discretion and judgment. Restatement of the Law of Trusts 2d, § 194. It is assumed that a settlor generally appoints more than one trustee because of his desire to attain for the beneficiaries of his trust the benefit of the wisdom of each, and the courts will not, as a general rule, interfere with the exercise of discretionary powers of trustees absent fraud or abuse of discretion. See: The Co-Trustee Relationship, Vol. 8.9 Real Property, Probate & Trust Journal (Spring 1973).

[6] Tested by these standards, did BTNB breach its duty to the Trust in refusing to acquiesce in Henley's suggestion to acquire as an investment for the Trust the stock offered at auction?

We hold that it did not and reverse that part of the decree of the trial court so holding.

One of this state's outstanding attorneys, while representing the Linn-Henley Trust, expressed grave doubt that the co-trustees had the power under the Trust to convert the inherited stock in the bank to stock in the holding company in connection with the merger/reorganization. In other words, an attorney while representing the Trust, questioned whether the Trust could properly hold stock in the holding company assuming it did not dissent from the plan of reorganization. Under these facts, we cannot hold as a matter of law that BTNB breached any fiduciary duty in refusing to purchase shares in the holding company or "new" bank stock as a new investment for the Trust.

III.

Was BTNB guilty of a breach of its fiduciary duties in

refusing to concur in Henley's recommendation that the Trust purchase 554 shares of Birmingham Realty Company stock in September, 1970?

[7] Undeniably, a trustee owes undivided loyalty to the Trust. This does not mean, however, that he is liable for a loss to the trust estate which did not result from a breach of that duty. III Scott on Trusts, §§ 204, 211 (3d ed. 1967).

The temporary trustee asserts that the court held on the first appeal that BTNB had breached its duty to the Trust in refusing to buy the Birmingham Realty stock. This is erroneous. The issue was remanded for a determination of whether BTNB had abused "its discretion in refusing to agree to the purchase." The temporary trustee argues that BTNB should be held liable to the Trust for its "deliberate disregard of foresight."

[8] BTNB is liable to the Trust in the Birmingham Realty matter only if it breached some duty to the Trust in refusing to make this investment at the time the decision was made. Was it an investment which a prudent man, managing his own affairs, would have made, based upon information then available? Liability cannot be based on the fact it subsequently developed that the investment would have been a good one. This is but the converse of the rule that a trustee is not liable if he makes an investment in a security which subsequently depreciates in value. III Scott on Trusts, § 204, supra, expresses the rule as follows:

> "The failure to make a profit which does not result from a breach of trust does not subject the trustee to liability. Thus if by the terms of the trust he is permitted but is not directed to invest in certain securities, he is not liable for failure to make the investment, al-

though the securities subsequently appreciate in value. . . . "

The rule has also been summarized by Headley, *Trust Investments,* 110 Trusts & Estates 739 (1952), as follows:

"The first and all inclusive requirement of the law is that a trustee shall act with complete and undivided loyalty to his trust. Second is that a trustee shall act prudently in the selection and management of investments. The elements of prudence are:

"(1) Care—a trustee must gather and weigh the facts and base his decisions on them rather than on rumor or guesswork;

"(2) Skill—a trustee must exercise the skill of the average person as a minimum; and if he has more than average skill he must exercise such skill as he has;

"(3) Caution—a trustee must not take chances which will imperil the accomplishment of the purposes of the trust.

" . . .

" . . . There must be balance between security of principal and amount and regularity of income; and the governing motive of the trustee must be sound investment for a long period and not speculation for a profit. . . . "

With specific reference to a trustee's investing in common stocks, this author says:

" . . . They represent no promise to return a dollar amount to the investor; their dividends are dependent on earnings and the action of a board of directors; they have always afforded an attractive vehicle for speculation. Nevertheless some of them have demonstrated,

over a long period of years, the qualities required for sound permanent investments. Intrinsic values have been maintained and dividends have been adequate and regular. The principal has been reasonably safe for a number of reasons: competent management, sound financing, position in an essential industry, a successful record and an adequate market. . . . "

[9] Tested by this standard, we cannot say that BTNB breached its duty to the Linn-Henley Trust in declining to invest its funds in stock of Birmingham Realty Company in 1970. The Trust instrument permitted the co-trustees wide discretion in making investments, but it did not direct them to invest in any particular security. In this instance, the co-trustees disagreed on the advisability of investing trust funds in Birmingham Realty stock. Henley urged the investment partly because the price at which the 554 shares could be purchased in 1970 was below book value and because the real estate holdings of Birmingham Realty had a market value far in excess of the value carried on the books of the company. Although the latter fact was widely known, stock in Birmingham Realty had traditionally sold at less than book value. One explanation for this was that the dividends paid were also traditionally low. The only way the underlying value of the real estate could be realized by the stockholders was liquidation, which was not practical.

There were a number of witnesses, knowledgeable about Birmingham Realty and themselves experts in the investment field, who testified that they had been willing to pay substantially more than market for *all* of the stock but would not be interested in less than all at a substantially lower price. Each of these witnesses testified that in 1970 Birmingham Realty stock was not a good investment for the Trust.

The record demonstrates that there existed a number of sound reasons for BTNB to reject Henley's proposal to make this investment. It fails to show wherein it was under a duty to do so. Therefore, it cannot be surcharged for its actions absent a showing of breach of some duty on its part. Consequently, that part of the court's decree awarding damages to the trust in the amount of $969,500 for failure of BTNB to concur in the purchase of 554 shares of Birmingham Realty Company is reversed.

IV.

Was BTNB properly removed as a co-trustee for the Linn-Henley Trust?

[10] The settlor of this Trust, over a period of 45 years, served as a director, president and, finally, chairman of the Board of BTNB. In designating the bank as co-executor and as co-trustee of his charitable trust he specified by his will that:

> " . . . the Birmingham Trust National Bank, a national banking association (or such successor corporation as shall succeed said Birmingham Trust National Bank by purchase, merger, consolidation, conversion or change of charter or name)."

The law governing removal of trustees is very clear in this state as elsewhere.

In II Scott on Trusts (3d ed. 1967), the following appears:

> "§ 107. A court which has supervision over the administration of trusts has power to remove a trustee for proper cause. Unless the grounds of removal are stated in a statute, and unless the grounds so stated are

> exclusive, the matter is one for the exercise of a sound discretion by the court. . . .
>
> "§ 107.1. The court is less ready to remove a trustee who was named by the settlor than it is to remove a trustee appointed by the court or by a third person in the exercise of a power to appoint trustees. . . . "

Also, in IV Scott on Trusts (3d ed. 1967):

> "§ 387. A trustee of a charitable trust may be removed as trustee for the same reasons for which a trustee of a private trust may be removed. Thus he may be removed for serious breaches of trust, for unfitness, for long-continued absence and the like. He can also be removed where his views are hostile to the purposes of the trust. . . . "

This court has stated the rule which prevails in this state:

> "The removal of a trustee is a drastic action which should only be taken when the estate is actually endangered and intervention is necessary to save trust property. *In re Crawford's Estate*, 340 Pa. 187, 16 A.2d 521; *In re Hodgson's Estate*, 342 Pa. 250, 20 A.2d 294; *Chambers v. Mauldin*, 4 Ala. 477; *Satterfield v. John*, 53 Ala. 127. This is especially true where the trustee is named by the settlor. *In re Crawford's Estate*, supra; *Taylor v. Errion*, 137 N.J.Eq. 221, 44 A.2d 356, affirmed 140 N.J.Eq. 495, 55 A.2d 11.
>
> "While the removal of a trustee is a matter resting largely within the sound judicial discretion of the trial court, it is equally clear that an abuse of that discretion renders its exercise subject to review. . . . " *Ingalls v. Ingalls*, 257 Ala. 521, 527, 59 So.2d 898, 903 (1952).

See also: *Walker v. Amason*, 369 So.2d 786 (Ala. 1979).

We have tediously reviewed the record in this case, which is voluminous, as one would expect in a trial lasting six weeks or more, and while we find evidence that the relationship between officers of BTNB and John Henley became strained during the merger/reorganization process and each of them took different positions as to what was in the best interests of the Trust, there is nothing to indicate the trust estate was endangered at any time. BTNB was in an awkward position in connection with the appraisal of the bank's stock held in trust. Its undivided loyalty to the Trust required it to attempt to have the stock appraised at a figure to obtain for the Trust the highest amount possible. It had a statutory obligation as "the receiving association" under Title 12, § 215a(d), to promptly pay the appraised amount to the dissenting shareholders. These conflicting obligations could not be reconciled and BTNB should have, as we held on the first appeal, sought guidance from the court. However, its failure to do so does not require its removal as a co-trustee. A similar situation is unlikely ever to recur and its having occurred one time does not disqualify BTNB from fulfilling its obligations under the trust instrument. Henley conceded that he and the bank's trust department had worked harmoniously in the discharge of their respective responsibilities to the Trust except for the matters concerned in this litigation and could continue to do so. We find nothing in the record to indicate otherwise. Therefore, that portion of the decree removing BTNB as co-trustee of the Linn-Henley Trust is reversed.

V.

The matter of attorneys' fees and costs:

[11] The attorney general and Henley appealed that

part of the decree awarding attorneys' fees from the Trust. They argue that those fees should be paid by BTNB and urge that the court erred in taxing them as costs against the Trust. They contend that the decree is in all other respects without error, except that Henley questions the amount of the award in fees to attorneys for the temporary trustee and for the services of the temporary trustee himself. BTNB asserts that the court properly taxed costs and attorneys' fees against the Trust, but also questions the amount of attorneys' fees awarded to various parties.

The trial court correctly held that such costs and attorneys' fees as are awardable may, under our law, be taxed against the Trust. Code 1975, § 34-3, 60.

In *Zimmerman v. First National Bank of Birmingham*, 348 So.2d 1359, 1367 (Ala. 1977), we addressed this issue and stated the rule as follows:

> "According to a well-established line of cases,
>
> " '[s]ection 63, Title 46, Code, is largely an enactment of the ancient principle of equitable origin, and there enforceable, which was referred to as costs between solicitor and client and said statute makes it apply at law as well as in equity when justified. That principle is that a complainant in equity, who at his own expense has maintained a successful suit for the preservation protection or increase of a common fund or of common property, or who has *created at his own expense or brought into court* a fund in which others may share, may have paid to him, or sometimes directly to his attorney, an attorney's fee for such services.
>
> "*Penny v. Pritchard & McCall*, 255 Ala. 13, 17, 49 So.2d 782 (1950). . . . "

Therefore, that part of the decree taxing attorneys' fees against the Trust, and made the basis of Henley and the attorney general's cross-appeal, is AFFIRMED.

Because we reverse the trial court's decree with regard to issues delineated in Sections II, III and IV herein, we must remand the attorneys' fee issue for reconsideration by the trial court in light of this opinion. It should determine the time spent and the contribution made by whom in connection with the issue in Section I (the appraisal issue) and fix attorneys' fees accordingly.

AFFIRMED AS TO SECTION I; REVERSED AND RENDERED AS TO SECTIONS II, III, AND IV; AND REMANDED WITH DIRECTIONS AS TO AMOUNT OF ATTORNEYS' FEES.

TORBERT, C. J., and BLOODWORTH, JONES, ALMON, EMBRY and BEATTY, JJ., concur.

MADDOX, J., dissents as to Section I, and concurs in the remainder.

FAULKNER, J., not sitting.

MADDOX, Justice (concurring in part and dissenting in part).

I dissent as to Part I, on some of the same grounds which I advanced, and which former Chief Justice Howell Heflin advanced, in our separate dissents on the original appeal. 295 Ala. at pages 50 and 56, 322 So.2d 688.

Even though this case involves thousands of dollars, the basic and controlling facts are undisputed. BTNB, as a co-trustee wanted to merge. Co-trustee Henley opposed merger. Under national banking laws, Henley, as co-trustee, became, in effect, the *sole* trustee in the merger proceeding. Exercising his right, he dissented, thus triggering the process of stock evaluation, sale at

public auction, etc. The procedure outlined by federal law was followed in the merger proceeding. During the merger proceeding, Henley, because of the mandate of federal law, was the "dissenting stockholder."

The majority upholds a finding by the trial court that the bank acted in bad faith at the evaluation stage. The evidence is uncontradicted that BTNB urged merger. Had Henley, as *sole* trustee, not dissented, there never would have been any necessity for the subsequent events, which Henley now complains about. In short, had Henley followed the advice of BTNB, the Trust estate would have been substantially benefited, not harmed. Why then should BTNB be accused of bad faith and be saddled with a loss resulting from an event over which it had no control, Henley's dissent?

77-382

BIRMINGHAM TRUST NATIONAL BANK, ET AL.

VS.

JOHN C. HENLEY, III, ET AL.

77-382A

CHARLES A. GRADDICK, ATTORNEY GENERAL

VS.

BIRMINGHAM TRUST NATIONAL BANK, ET AL.

77-382B

JOHN C. HENLEY, III

VS.

BIRMINGHAM TRUST NATIONAL BANK, ET AL.

June 8, 1979

IT IS ORDERED that the applications for rehearing filed in this cause on April 20, 1979, be, and the same are hereby, overruled.

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court. Witness my hand this 13th day of August, 1979.

J. O. Sentell

Clerk, Supreme Court of Alabama

JEFFERSON CIRCUIT COURT #168-659

EARLIER OPINIONS

CIRCUIT COURT,
TENTH JUDICIAL CIRCUIT
OF ALABAMA
EQUITY DIVISION

BIRMINGHAM TRUST NATIONAL BANK,
COMPLAINANT

VS.

JOHN C. HENLEY, III, et al
RESPONDENTS

CASE NO. 168-659

(September 24, 1973)

FINAL DECREE

This cause was duly set for oral hearing in Open Court on the merits. Testimony was presented ore tenus. The cause has been duly submitted by the parties for consideration and determination by the Court. The issues presented do evoke a justiciable controversy, properly brought before a Court of Equity.

Unfortunately, the dispute brought forth in the pleadings is between the co-trustees of a charitable trust. The issues (as delineated and argued by counsel in their excellent and informative briefs and memoranda) are "delicate" and "involved." This Court has spent much time and thought in the consideration thereof. It would serve no good purpose for the Court to set forth herein an extended and detailed finding of fact and of a fiscal accounting. If this cause is reviewed by a higher tribunal it would become apparent to the reviewers that a careful study of *all* of the pleadings and proof is necessary and

the gistal findings which appear hereinafter should be sufficient.

The Court finds as follows:

There has been no breach of its fiduciary duties under the trust by Complainant. By this finding, this Court does not intend to state that there have not been instances, in its part in the execution of the trust, where Complainant has acted unwisely or precipitately. It must have been apparent to Complainant and its trust officers that, from time to time, during the life span of the trust to date, a division of opinion relating to the wisdom or propriety of the execution of the trust affairs was involved as between the co-trustees. When such a division of opinion became apparent, Complainant should have, by proper written petition or even by informal discussions with its co-trustee and this Court, sought, *in advance of any direct action on the disputed question*, a resolution thereof and a confirmation by a directive of this Court. But this opportunity and duty was also available to and incumbent upon the co-trustee. Hereafter, in the management and execution of the trust, the co-trustees are admonished to avail themselves of the services, advice, sanctions and directives of this Court whenever they cannot agree or whenever, even when they do agree, the matter under consideration is of unusual import or complexity.

The Court should and does further state that Respondent, William J. Baxley, in his capacity as Attorney General of the State of Alabama, has appeared through formal pleading and continual presence in Court during the oral hearing (through one or more of his representatives) on behalf of the beneficiaries of the charitable trust and has not, in any manner, approved or disapproved of the actions of the other parties as expressed in the pleadings and in the evidence but has, by his "Answer," requested "the Court, by any decree entered in this cause, to protect the interest of each and every charitable beneficiary involved in this suit."

It is CONSIDERED, ORDERED, ADJUDGED and DECREED by the Court as follows:

ONE: An additional payment in the sum of TWENTY EIGHT THOUSAND TWO HUNDRED ELEVEN AND NO/100 DOLLARS ($28,211.00) shall be effected forthwith by Birmingham Trust National Bank (as a Bank and not as a co-trustee) to the trustees for the benefit of the Trust and upon the making of the said payment the fiduciary obligations of Complainant as a co-trustee shall be fully satisfied with respect to the "merger," the "dissent-therefrom," "the payment of the value of the stock" and the "auction sales."

TWO: "The auction sales of the shares of stock of BTNB Corporation and of the shares of stock of Petitioner "(Complainant)" described in paragraph 17 of "(the) original 'petition'," (of Complainant) "fully comply with the requirements of 12 U.S.C. 215a(d)" and the sales thereof are hereby confirmed in all respects.

THREE: The trust statement and report, as attached to the original petition of Complainant as Exhibits C-1 and C-2 are hereby affirmed as a partial accounting and settlement of the trust and the co-trustees are absolved of the duty of furnishing any further account of the transactions as described in the said two Exhibits; and Complainant and Respondent, Henley, are released and discharged of any and all liabilities, individual or joint, (except as may be herein indicated and expressed) with respect to all of their acts and dealings affecting the assets and liabilities of the Trust estate from the beginning of the Trust to the date of the filing of the original petition in this cause.

FOUR: The Complainant is awarded an attorney's fee in the sum of SEVEN THOUSAND FIVE HUNDRED AND NO/100 DOLLARS ($7,500.00) for the services of its counsel of record in this cause, to be taxed to and included as a part of the costs of court in this cause.

FIVE: The Respondent, John C. Henley, III, is awarded an attorney's fee in the sum of SEVEN THOUSAND FIVE HUNDRED AND NO/100 DOLLARS ($7,500.00) for the services of his counsel of record in this cause, to be taxed to and included as a part of the costs of court in this cause.

SIX: The separate and several prayers as contained in the "Answer And Cross-Bill Of Respondent, John C. Henley, III," as amended, are hereby separately and severally overruled and denied, except as herein otherwise set forth and specified.

SEVEN: The costs of this action are taxed to and against the Trust estate, for which let execution issue.

DONE and ORDERED this the 24th day of September, 1973.

William C. Barber
CIRCUIT JUDGE IN EQUITY SITTING

295 Ala. 38

322 So.2d 688

John C. HENLEY, III

v.

BIRMINGHAM TRUST NATIONAL BANK.

SC 780.

Supreme Court of Alabama.

Aug. 21, 1975.

As Corrected on Denial of Rehearing
Nov. 6, 1975.

JONES, Justice.

This is an appeal from a decree of the Circuit Court of Jefferson County entered on a petition filed by Birmingham Trust National Bank (appellee) which prayed for instructions and for ratification of previous acts by BTNB, as co-trustee of a charitable trust. John C. Henley, III (appellant), the other co-trustee, whose cross bill seeking removal of BTNB as co-trustee and other relief was denied, now appeals the order of instructions and ratification given BTNB.

The Trust involved is the Linn-Henley Charitable Trust which was established by the will of Walter E. Henley, the uncle of appellant Henley. Walter Henley was a member of the Board of Directors of BTNB for a period in excess of 50 years and President and Chairman of the Board of the Birmingham Realty Company. The trust corpus consisted almost entirely of stock, one-half of which was BTNB stock. The beneficiaries of the Trust, selected by the co-trustees, are limited to:

" . . . any corporation or organization organized and operated exclusively for religious, charitable, scientific, literary or educational purposes . . . whose activities are exclusively within the geographical limits of Jefferson County, Alabama or . . . which maintain branch operations within Jefferson County . . . [but any amounts distributed to the latter] must be expended . . . within Jefferson County . . . "

In the fall of 1968, the management of BTNB decided that it would be advantageous to change its corporate structure from a National Banking Association to that of a "holding company." When this merger was completed, the new structure would consist of a national bank known as the Alabama National Bank, and a Delaware business corporation known as the BTNB Corporation which would own all of the stock of the "new" national bank.

The plan of merger, as governed by the National Banking Act, 12 U.S.C. § 215a, was that the existing bank would be merged into the "new" bank. The "new" bank would not issue stock in the National Banking Association to the shareholders of the "old" bank, but instead would issue one share of stock of the "new" bank directly to the Delaware business corporation in exchange for stock of the existing bank. The Delaware corporation would then issue one share of stock of that corporation for each share of stock in Birmingham Trust National Bank turned in for conversion. When these various steps were completed, each former shareholder of Birmingham Trust National Bank would hold stock of the Delaware business corporation known as BTNB Corporation.

Although over 80% of the stockholders were in favor of this merger, Henley was opposed to it since he felt that from an investment viewpoint the stock of "old" BTNB

was more desirable. Thereupon, under authority of 12 U.S.C. § 61(3), which states that in a situation where a national bank and one or more individuals are co-trustees of a trust containing stock of the national bank, the shares of the bank stock may be voted by the individual co-trustee as though he were sole trustee, Henley voted both his personal stock and the Trust's 27,460 shares against the merger, and made extensive remarks in support of his position at the stockholders' meeting. The merger was approved by the Comptroller and became effective on December 31, 1968.

On January 30, 1969, Henley informed BTNB that the Trust was dissenting from the merger. BTNB, to state it mildly, was quite incensed at this course of action pursued by Henley and unsuccessfully attempted to persuade him not to continue with his planned avenue of dissent.

The President of BTNB even arranged a meeting between Henley and one J. Craig Smith, a director of BTNB and Chairman of the Board of Avondale Mills, in the hope that Smith could persuade Henley not to dissent from the merger. It seems that Henley's company, Birmingham Publishing Company, had for some years been responsible for printing the annual reports of Avondale Mills. In fact, one year earlier Birmingham Publishing Company performed over $30,000 worth of services for Avondale Mills. Conspicuously, however, after this meeting with Smith, wherein Henley refused to alter his stand, Birmingham Publishing's business with Avondale Mills dwindled to $640 two years later.

The statutory procedure for dissent by a stockholder in the present situation is outlined in 12 U.S.C. § 215a(b), (c) and (d). In substance, that procedure is as follows: Those shareholders who are opposed to the merger, as

was the Trust, shall be entitled to receive the value of the shares they hold after the merger is approved by giving the receiving association (the "new" bank) notice of such intent at any time before thirty days after the date of consummation of the merger, and by surrendering the stock certificates.

The value of the shares of any dissenting shareholder shall be ascertained by an appraisal made by a committee of three persons, composed of (1) one selected by the vote of the holders of the stock who are dissenting; (2) one selected by the directors of the "new" bank; and (3) one selected by the two so selected.

If, within 90 days of the consummation of the merger, for any reason one or more of the appraisers are not selected, or they fail to determine the value of the shares, the Comptroller, upon written request of any interested party, shall determine the value of the shares which shall be final and binding on all parties. This amount shall be promptly paid to the dissenting shareholders by the "new" bank. Then those shares of the "new" bank which would have gone to the shareholders in exchange for their shares of "old" bank stock, had they not dissented, shall be sold at an advertised public auction. The "new" bank has the right to bid on the "new" stock, and if the price paid at this auction is greater than that paid to the dissenting shareholders, the difference shall be paid to the dissenting shareholders. If the "new" bank is the highest bidder at this auction, it shall resell these shares within 30 days thereafter to such person or persons as it shall desire.

Henley, in compliance with the statute, gave BTNB notice of his intent to dissent and surrendered the shares held by the Trust. Henley appointed one appraiser, though no notice was given to BTNB of such appoint-

ment, and BTNB did not appoint anyone to appraise the value of the stock. Neither Henley nor BTNB complied with the 90-day requirement of notifying the Comptroller should the appraisers not be appointed or be unable to agree as to the value of the stock. In fact, Henley never gave notice to the Comptroller and BTNB did not do so until September 23, almost eight months after the merger.

The Comptroller finally did determine the value of the shares of $32.80 a share, for a total of $900,688. Neither co-trustee submitted any pertinent information to the Comptroller which might have aided him in reaching his decision as to the value of the shares.

As required by the statute, BTNB then offered for sale at auction the holding company stock, i. e., the equivalent of the stock of the old bank. The only bid was by BTNB Corporation—the holding company—for $26 per share. Since this bid did not exceed the $32.80 per share previously paid by the dissenting shareholders, no further payment was made by BTNB to the Trust.

In addition to the foregoing transaction, Henley also wished to persuade BTNB to allow the Trust to purchase stock in Birmingham Realty Company. The company, of which Walter Henley was a substantial stockholder, originally owned about 2700 acres where the City of Birmingham is located. It still owns in excess of 200 parcels of real estate in the area.

Henley's argument in favor of purchasing more stock in Birmingham Realty was based on his contention that Walter Henley had in the past discussed with him his desire to bring control of the company to Birmingham from New York. In 1970, about 5% of the outstanding stock in Birmingham Realty came up for sale. If the stock could be acquired, the New York holdings in the com-

pany would be reduced below 20% and control would then be centered in Birmingham. Henley began negotiations and was told that the stock, with a book value of $900 per share, could be purchased for $650 per share. BTNB refused to agree to the purchase. It was stipulated that the last trade of Birmingham Realty stock before the trial was 5 shares at $1800 per share on May 14, 1973, and that less than 10 shares were offered by the Montgomery office of Sterne, Agee and Leach at a price of $2050 per share.

In April, 1970, Henley demanded further payment by BTNB to the Trust. (Prior to this, BTNB had mistakenly paid $32,952 as dividends on stock of the Delaware Corporation since the Trust no longer owned the stock, and had offered to pay the Trust $28,211 or approximately 6½% interest on the appraised value of the BTNB stock which it had had the use of for more than a year.) After an extended period of unfruitful negotiations between the two co-trustees, BTNB petitioned the circuit court for instructions and ratification of previous acts.

The issue presented, then, is whether either or both BTNB and Henley, as co-trustees of a charitable trust, are guilty of a breach of their fiduciary duty owed to the Trust as trustees. We find that both are guilty of such a breach.

[1] Initially, we would point out, irrespective of Henley's contentions, that we are not here to decide the propriety vel non of BTNB's decision to merge itself from a national banking association to that of a "holding company." This is a decision solely within the discretion of the directors and shareholders of BTNB. As previously noted, the option of dissent was readily available to those who were in disagreement with that decision. Thus, Henley's argument in this respect is without merit.

[2] It is a fundamental rule of law that a trustee must act in good faith and display complete loyalty to the interests of his beneficiaries. *First National Bank of Birmingham v. Basham*, 238 Ala. 500, 191 So. 873 (1939); *Barker v. First National Bank of Birmingham*, 20 F.Supp. 185 (D.C., Ala. 1937). It is this duty, in our opinion, that the co-trustees have breached.

The primary error in the decree of the lower court can clearly be seen when it stated:

> "There has been no breach of fiduciary duties under the trust by Complainant. By this finding, this Court does not intend to state that there have not been instances, in its part in the execution of the trust, where Complainant has acted unwisely or precipitately. It must have been apparent to Complainant and its trust officers that, from time to time, during the life span of the trust to date, a division of opinion relating to the wisdom or propriety of the execution of the trust affairs was involved as between the co-trustees. When such a division of opinion became apparent, Complainant should have, by proper written petition or even by informal discussions with its co-trustee and this Court, sought, in advance of any direct action on the disputed action, a resolution thereof and a confirmation by a directive of this Court. *But this opportunity and duty was also available to and incumbent upon the co-trustee*. Hereafter, in the management and execution of the trust, the co-trustees are admonished to avail themselves of the services, advice, sanctions and directives of this Court whenever they cannot agree or whenever, even if they do agree, the matter under consideration is of unusual import or complexity." [Emphasis supplied.]

[3-5] The trial Judge was correct when he determined

that BTNB should have sought a resolution of this problem in advance of any direct action on its part. *Gilmer v. Gilmer*, 245 Ala. 450, 17 So.2d 529 (1944). The crux of the controversy, however, as found by the Court, is not the relative right or fault of the co-trustees, but rather the separate and several duties of each to the Trust; and any breach on the part of one co-trustee would certainly not excuse those duties of good faith and loyalty owed by the other co-trustee. After all, charitable trusts are especially favored in equity. *Mastin v. First National Bank of Mobile, Inc.*, 278 Ala. 251, 177 So.2d 808 (1965). Thus, this suit is clearly not concerned with the rights and duties of one co-trustee as opposed to those of the other, but solely with those of the Trust. The principle of contributory or comparative fault or neglect as between co-trustees plays no role in measuring the proper discharge of this high duty imposed by law on each trustee.

[6] We will first deal with the breach by both BTNB and Henley in their handling of the Trust's interest in the dissent procedure. Under the outlined procedure of dissent, three appraisers were to be selected. Henley selected one but failed to notify BTNB of such selection and BTNB neglected to select an appraiser at all. Consequently, the third appraiser could not be selected. Additionally, this step not having been complied with, a Comptroller should have been notified within 90 days from the date of the merger. Henley did not give such notice at all, and BTNB did not give it until about eight months after the merger. BTNB attempts to excuse its failure to appoint an appraiser by Henley's failure to notify it of his selection, and that the second procedure of allowing the Comptroller to make the appraisal was always available in lieu of selecting the three appraisers.

These were acts of contest and struggle between the co-trustees and can hardly be said to be acts of good faith

and exercises of undivided loyalty on the part of either co-trustee. Every step possible to insure that the Trust assets were protected should have been taken; and it was incumbent upon each to comply with the fiduciary standards required of a trustee irrespective of the default of the other. The default of each is apparent and inexcusable.

[7] Henley contends that BTNB should have at least temporarily removed itself as a co-trustee when it was notified of the Trust's decision to dissent from the merger. A conflict of interest was apparent, says Henley, since BTNB was placed in a position whereby on the one hand it had the duty as a co-trustee to see that the Trust received the highest price possible for the stock and, on the other, as the purchaser of the stock, to see that the lowest possible price was paid.

BTNB contends that there was no incumbent duty upon it to resign and that there was no conflict of interest since Henley's decision that the Trust would dissent from the merger forced them into the situation where they became both a seller and a purchaser; also, the dilemma was resolved by the statutory dissent procedure available. With this we cannot agree. Henley did not force BTNB into this situation by merely exercising a legal right in favor of the Trust; but it was the duty of BTNB to recognize the obvious conflict of interest which resulted and resolve it by at least temporarily resigning as trustee.

[8] A breach of the co-trustees' duties can be seen in the alternative step of having the Comptroller fix the value of the stock. Neither co-trustee submitted any pertinent information to the Comptroller which might have enabled him to make a more favorable determination of the value of the Trust's BTNB stock. Henley requested annual reports and "internal audits" of BTNB for the

five years preceding the merger. The reports were delivered but the "audits" were not. BTNB stated that the audits did not contain any information which would be pertinent to the Comptroller's appraisal of the stock. Henley excuses his failure to submit any information to the Comptroller on BTNB's failure to supply the audit information. BTNB attempts to excuse its failure to submit information to the Comptroller for two reasons:

First, due to Henley's decision to dissent, he became, for all practical purposes, the sole trustee and thus the duty to submit the information fell on his shoulders and off those of BTNB. (This contention of itself reveals the inherent conflict of interest.)

Secondly, since the Comptroller already possessed extensive information about BTNB as a result of the national bank examination performed two or three times a year, there was no need on their part to submit any additional information. (This virtually admits a default in the discharge of its obligation.)

Again, we cannot agree that the acts or omissions of either co-trustee excused the subsequent breach of duty by the other co-trustee. BTNB and Henley should have each taken the initiative to submit as much information as possible to the Comptroller to enable him to make an accurate appraisal of the stock's value.

[9] Notwithstanding the foregoing. BTNB contends that the Comptroller's appraisal, as stated in 12 U.S.C. § 215a(d), "shall be final and binding on all parties"; and that even if such appraisal was not final and binding, it could only be reviewed by a direct proceeding in which the Comptroller was a party. That is to say, BTNB's contention is that federal law has preempted this entire area of law and that a state court, therefore, is precluded from reviewing the Comptroller's appraisal. Here, again,

this contention proceeds on the false premise that the controversy is limited to BTNB and Henley. Moreover, the flaw in this contention is that we are not reviewing the finding of the Comptroller. We are reviewing the acts of the co-trustees, as such acts relate to their fiduciary duties to the Trust, which supervisory jurisdiction has not been preempted by the federal statutes and rests exclusively with the state court.

BTNB contends that, assuming the Comptroller's appraisal was affected by the actions or inactions of either co-trustee, the Comptroller's decision is not subject to review under authority of *Heikkila v. Barber,* 345 U.S. 229, 73 S.Ct. 603, 97 L.Ed. 972 (1953), and *Crane v. Hahlo*, 258 U.S. 142, 42 S.Ct. 214, 66 L.Ed. 514 (1922). Neither case supports such contention.

In *Heikkila*, an alien was deported by order of the Attorney General under authority of § 19 (a)[1] of the Immigration Act of 1917, which states that such order "shall be final." Judicial review was proscribed by the very terms of the Act and the complaining parties sought just such a review. The Court recognized habeas corpus, in which issues not administratively adjudicated under the Act could be raised, as the only available remedy.

Crane was concerned with the amount of damages awarded in an eminent domain proceeding by the Board of Revision of Assessments in which the statute authorizing such proceeding provided that the award was final and conclusive. Both of these cases deal with efforts to review the merits of previously adjudicated issues expressly contrary to the proscription contained in the Act authorizing the proceedings; and the principle which dictated the result in each case is distinguishable from the case at bar in that the issue before us—the fidelity vel non

1. 39 Stat. 889, as amended, 54 Stat. 1238, 8 U.S.C., § 155(a).

of a co-trustee—has not been, nor could it have been, adjudicated.

That the preemption doctrine has a field of operation can be seen from the case of *Rogers v. First National Bank of St. George*, 297 F.Supp. 641 (D.C., S.C., 1969), which held that national bank merger procedures are controlled by federal and not state law. The Federal Act does not address itself, however, to fiduciary duties,[2] and this is recognized by the final section of the Act which prohibits discrimination in the removal of a merging bank, as a trustee, by a state court on the sole ground that it has availed itself of the merger procedure authorized by the federal banking laws. The federal law cannot preempt that which it does not include nor purport to deal with. The state law is, and necessarily must remain, fully intact with respect to its supervisory jurisdiction of trust estates.

We now turn to Henley's contention that BTNB's refusal to consent to the purchase of Birmingham Realty Company stock for the Trust was premised on consideration for its private interest and not those of the Trust. Credence is given to this contention by the testimony of a BTNB trust officer when he stated:

> "I think there were probably two principal disadvantages concerning the substantial ownership of the Trust would have had in Birmingham Realty Company, one would have been that the stock could have been pivotal in perhaps controversial decisions of the corporation, and we do not think that would have been something we would have liked at the time. A number

2. The reference here to "fiduciary duties" is to be understood in the context of the law of trusts; the reference is not to those duties owed by a bank to its dissenting stockholders absent the trustee relationship. Indeed, as to ordinary stockholders who dissent from the merger, the Federal Act contemplates that a bank is cast in an adversary role—a role abhorred by the law of trusts.

> of people who are principals, or who were principals of Birmingham Realty Company at the time or directly interested in the company, were good friends and customers of the Bank, and it could also have been conceivable that a situation would have developed . . . wherein the interest of the Trust would have been adverse to the interest of those individuals, which would have placed the Bank in a situation of where regardless of what we did we might have been criticized for it.
>
> "We do not think that owning that much stock of the company would have been desirable, principally for those reasons."

[10] As stated in *Barker v. First National Bank of Birmingham*, supra, when referring to the duties of a trustee, "all personal or selfish interests and all consideration of the interests of third parties must be excluded. His must be an undivided loyalty."[3]

[11] Clearly, if the foregoing statement is the true reason for BTNB's refusal to purchase the stock, then it has committed a definite breach of its fiduciary duty.

BTNB asserts that its reasons for refusing to purchase the Birmingham Realty stock are as follows:

3. Justice Cardozo, speaking for the majority in *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545 (1928), said: "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honestly alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. *Wendt v. Fischer*, 243 N.Y. 439, 444, 154 N.E. 303. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court." See also *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 81 S.Ct. 294, 5 L.Ed.2d 268 (1961).

1) The purchase would concentrate too much of the Trust's assets in a closely held corporation.

2) The stock provided low income which might prove troublesome under the Tax Reform Act of 1969.

3) Since it was a closely held company, the stock would be difficult to sell.

4) The value of the stock would be difficult to determine.

5) Owning this much stock would make the Trust influential in company affairs, perhaps pivotal in conflicts among the controlling shareholders, and would create a situation wherein conflict between the co-trustees might be encouraged.

6) There was no proof in the will that Walter E. Henley desired for the Trust to make such a purchase.

7) The purchase would have no relation to the avowed charitable purpose of the Trust, and

8) If the Trust were allowed to purchase the stock, then Henley and his cousin, Carl Wittichen, already a substantial stockholder of Birmingham Realty Company, would then effectively control 18% of Birmingham Realty Company.

When taken together, and fully analyzed, these reasons are but supportive of the conclusions stated in the trust officer's testimony and demonstrate the legal conclusiveness of the conflict of interest on behalf of BTNB with respect to this transaction.

[12] Next, BTNB contends that, assuming some breach of duty on their part, no evidence was adduced showing that any damage to the Trust resulted therefrom. Indeed, the anomaly encountered in obtaining any

"after the fact" remedy on behalf of the Trust is readily apparent. The bank stock, the value of which is the principal asset involved, is gone. So is the Birmingham Realty stock. But the difficulty of ascertaining the loss, if any, suffered by the Trust can never be a legal ground for ratification of such flagrant abuse of fiduciary duties by the co-trustee. If difficulty of solution were the basis for denying a remedy, hardly any field of operation would exist for the equity arm of the Court.

[13] We recognize that our remand of this cause with instructions for resubmission of the issue of damages to the Trust, if any, places on the trial court a responsibility which would not have arisen had there been a good faith utilization of the procedure set out in the Federal Act with regard to placing a value on the bank stock. But, here again, federal law contemplates faithful discharge of fiduciary duties, and does not speak to fiduciary accountability. Therefore, the guilty trustee cannot be heard to complain that its misconduct invites, with its attendant risks, a state court review and determination of liability for damages, if any, to the Trust. As we have previously observed, state courts exercising supervisory jurisdiction over trusts provide the only available forum for such review and determination.

[14] This case is remanded to the trial Court with the following instructions:

1. Appoint a Temporary Trustee of the Trust Estate in lieu of the named co-trustees for the sole and limited purpose of the retrial of this cause.

2. Upon resubmission of this cause, make the following specific findings of fact and conclusions:

(a) Determine what data should, and except for the conflict of interests of the co-trustee—BTNB—

would, have been made available to the Comptroller; and, from such data, fix the value of the "old" bank stock as of the time such ascertainment is contemplated by the Federal Act. If the value as fixed is more than the value fixed by the Comptroller, award to the Trust as damages the sum equal to the difference against BTNB.

(b) In which latter event (if the fixed value per share exceeds $32.80), determine the true bid value of the "new" bank stock had BTNB, absent its conflict of interests, actively sought potential bidders as of the time of the public auction as provided by the Federal Act. If the bid value so fixed is higher than the ascertained value of the stock as fixed under (a) above, award to the Trust as additional damages the sum equal to such difference against BTNB.

(c) If the ascertained value of the "old" bank stock is less than $32.80 per share, but the per share auction value as fixed under (b) above exceeds $32.80, award to the Trust as damages the sum equal to the agregate of the difference between such per share auction value and $32.80 against BTNB.

It is suggested that the price obtained by BTNB upon resale of the "new" stock within the 30-day period following the auction, as prescribed by § 215a(d), is relevant data (subject, of course, to any admissible evidence of price variance) for consideration in making such determination.

(d) Determine whether the ascertainable true value of Birmingham Realty stock and the asking price therefor of the 'N. Y. block," along with the other material factors, rendered BTNB's conflict of interests responsible for an abuse of discretion in refusing to agree to such purchase. If so, award to

the Trust as damages such sum as the Court may deem reasonable and adequate to make the Trust whole in light of all competent evidence adduced on this issue.

(e) Determine whether BTNB's evidenced conflict of interests is so inherent in the nature of its relationship to the Trust and to the Co-trustee Henley as to render BTNB disqualified to further serve as co-trustee to the instant Trust Estate; or, whether the resolution of the instant controversy will so dissolve the conflict of interests as to render BTNB fully competent and qualified to serve as co-trustee; and to implement by order of the Court such determination as the interest of the Trust Estate may require.

3. Determination and award of expenses and fees chargeable against the Trust Estate shall be limited to those reasonably and necessarily incurred by the Temporary Trustee and his attorney.

[15] In conclusion, we observe that the Attorney General of the State of Alabama was made a party to this litigation as authorized by *State v. Bibb*, 234 Ala. 46, 173 So. 74 (1937). The record shows that the Attorney General filed an answer requesting in effect that the Court protect the interests of the beneficiaries to the charitable Trust. Except for one apologetic reference made by the trial Judge to his failure to recognize the representative from the Attorney General's office for the purpose of examining a witness, the record is moot as to any participation by the Attorney General in the trial of this cause. The wisdom of *Bibb*, authorizing representation of the beneficiaries of a charitable trust by the Attorney General, is abundantly exemplified by the posture of the record in this case. We have noted this fact merely to

comment that we deem appropriate the active participation by the office of the Attorney General on behalf of the beneficiaries of the Trust Estate upon retrial of this cause.

Reversed and remanded with instructions.

MERRILL, ALMON, and EMBRY, JJ., concur.

SHORES, J., concurs in the result.

HEFLIN, C.J., and MADDOX, J., dissent.

BLOODWORTH and FAULKNER, JJ., not sitting.

MADDOX, Justice, (dissenting).

Everyone seems to agree that this is a unique case, but as I view it, there is just one legal question—what is the duty of a national bank in consolidation or merger proceedings, when the bank is co-trustee of a charitable trust, and a major asset of the trust is the stock of the bank?

The majority opinion sets out the facts and I shall not restate them, but I do list a few of the basic points for a better understanding of my dissent. This charitable trust was established by the late Walter Henley who was a director, a president and later chairman of the board of Birmingham Trust National Bank, one of the co-trustees. This controversy arose when BTNB decided to merge into a holding company. The other co-trustee, John C. Henley, III, was opposed to the merger.

In this proceeding, the trial judge, after hearing extensive testimony, did not find that the bank had been disloyal to the trust, although he did point out that the bank and Henley should have received instructions in advance. The attorney general, representing the beneficiaries of the charitable trust, does not question the trial court's finding of no disloyalty on the part of BTNB.

My dissent is based on these basic points:

1. Under the facts of this case, I find no prejudicial error in the trial court's determination that the bank was not disloyal;

2. The conduct of fiduciary business by BTNB, a national bank, was governed by federal law and regulation;

3. Since there was no cross-appeal, I believe this Court exceeds its appellate jurisdiction when it finds that co-trustee Henley was also disloyal;

4. I question whether, on the record before us, this Court should direct the attorney general in the exercise of what, normally, is considered to be his executive discretion.

First, let me point out that I believe that the majority has acted in good faith, and that they sincerely believe, as indeed they find, that both Henley and BTNB were disloyal to this trust. I believe, however, that the majority has made an inflexible application of the conflict of interest rule, which I believe is not suitable in this case. Furthermore, the majority has specifically failed to apply the principle that the conduct of fiduciary business by national banks is governed, significantly, by federal laws and regulations.

The bank acted in good faith.

The trial judge determined that the bank acted in good faith. There is substantial evidence to support this finding, and I believe that this finding of no disloyalty is very important to a decision in this case.

Nobody can quarrel with the fundamental rule of law, stated in the majority opinion, that a trustee must act in *good faith* and give *undivided loyalty* to his trust. *First Na-*

tional Bank of Birmingham v. Basham, 238 Ala. 500, 191 So. 873 (1939).

Unquestionably, if a trustee has engaged in self-dealing, as a matter of public policy, and because of the temptation of wrongdoing, the cestui que trust (the attorney general represented them in this case) may elect to affirm or disaffirm, unless countervailing equities have intervened. Whether the trust estate sustained a loss or profited is of no consequence. The *Basham* case also says that the primary consideration is the *good faith* of the trustee. In *Basham*, the trial court had surcharged the trustee. This Court reversed and remanded the case, saying at one point:

> "Banks, authorized by law to engage in a trust business, owe the same fidelity, and are subject to the same rules governing individual trustees, when applicable on principle.
>
> "A distinction must be drawn between transactions wherein the interest of the bank and the trusts in its keeping are in common, as where the acts of the bank are in aid of such trusts, and transactions wherein their interests are antagonistic. Statutes conferring upon State or National Banks the power to engage in a trust business are designed to make available to investors the facilities and the experiences of Bankers in making investments, safeguarding the trusts by setting up trust departments, directly engaged in the handling of trusts, and keeping complete records of trust transactions relating to each trust, subject to examination by the supervising agencies of government.

A close reading of the *Basham* case indicates to me that this Court recognized in that case that even if a conflict of interest may seem to exist, the *good faith* of the trustee is the critical question.

The majority also cites *Barker v. First National Bank of Birmingham,* 20 F.Supp. 185 (D.C.Ala.1937), in support of their position that BTNB was disloyal. I believe the majority has failed to read what this Court said about the *Barker* case in *Basham*, as follows:

> "Such dealings are challenged as violation of the rule of undivided loyalty to each trust. If the trustee has no personal interest to serve, there is nothing inherent in such transaction inconsistent with full loyalty to both; may do both a good service. We do not concur with the views expressed in *Barker v. First Nat. Bank of Birmingham,* D.C., 20 F. Supp. 185, 190, to the effect that loyalty to the selling trust in such case demands a sale at the highest obtainable price, and loyalty to the buyer demands a purchase at the lowest price. One of the criticisms of participations is that the market therefor is limited to the family of trusts. It would be a severe rule to charge a trustee with a breach of trust toward the seller where he has obtained the full amount he would have received if he had collected the loan at the time, or a breach of trust toward the buyer who gets a good loan on like terms he would have gotten on a new mortgage, and without the expense of negotiating and closing a new loan.
>
> "We concur in the Restatement, supra, to the effect that when challenged as unfair, resulting in loss to the buyer, *the burden is on the trustee to show the transaction was in good faith, and in the exercise of sound discretion and prudence in making this, as any other investment.*" (Emphasis added.)

In *Barker*, the federal district court had criticized the bank on an inter-trust sale of a mortage participation, but did not surcharge the trustee which acted in good faith.

I believe that Alabama follows the rule, advocated by

many legal writers, that when conflicts of interest cases involving corporate trustees arise, they should be approached in light of the remoteness of the conflict and the presence or absence of good faith. See, Prochnow, *Conflict of Interest and the Corporate Trustee*, 22 Bus. Law, 929 (1967); Comments, *Corporate Trustee's Conflict of Interest*, 25 U.Chi.L. Rev. 382 (1958). The writer of the University of Chicago Comment thinks both *Basham* and *Barker* suggest "the use of good faith as a defense" in a conflicts of interest case. It has also been suggested that almost every trustee is subject to some degree of divided loyalty. Niles, *The Divided Loyalty Rule*, 91 Trusts and Estates, 734 (1952). Niles states the most common disloyalty is for a trustee to conduct himself so that he can be safe from any criticism.

The problem I have with the majority opinion is that I do not think the opinion recognizes the use of good faith as a defense in a conflict of interest case. Even if I did not think that this Court had recognized good faith as a defense in a conflict of interest case, I believe the settlor of this particular trust recognized that, on occasion, one or both of the trustees might have an "adverse interest." The only limitation he made was that each trustee should not exercise any power or discretion for the "personal advantage of the trustees." The specific trust clause provides:

> "In the management and control of the trust estate, the Trustees may (*irrespective of the adverse interest of any Trustee*) do and have done with respect to the trust estate and every part thereof all things which in the sole judgment and discretion of the Trustees may seem necessary, desirable or proper to promote, protect or conserve the interests thereof and of the beneficiaries thereof, in like manner as if the Trustees were entitled to said property beneficially, and every

> determination of the Trustees in the construction of powers or in any matter with respect to which the Trustees may be empowered to act or exercise discretion hereunder, whether made upon a question formally or actually raised or implied in any act or proceeding of the Trustees in relation to the premises, shall be binding upon all persons interested in the trust estate and shall not be objected to or questioned on any grounds whatsoever. Powers and discretion, however, are vested in the Trustees as fiduciaries in the interest of the trust estate and its beneficiaries and not for the personal advantage of the Trustees." (Emphasis added.)

As I read this clause, the trustees could act, "irrespective of the adverse interest" of either of them, but they must act in good faith for the best interest of the trust. Now, there was a difference of opinion between the co-trustees about whether the merger was in the best interest of the trust. If both trustees acted in good faith, thinking their independent judgments were in the best interest of the trust, why is that a breach of trust? Is it not possible that the bank's business judgment concerning what was good for the bank would also be good for the trust, especially since a substantial asset in the trust was the bank stock?

In *Basham*, this Court seems to approve of transactions where the interests of a trustee coincides with those of the trust, assuming, of course, the presence of good faith:

> "Since the trustee has the clear right to deposit such funds in a good and solvent bank, there is no reason, nor legislative policy, to require deposit in a bank other than that selected by the settler to handle trust funds although the trustee bank, like any other bank, would hold them as available assets for loans on its own ac-

count. See, also, *Robinson v. Williams, Superintendent*, 229 Ala. 692, 159 So. 239. National Banks are required to deposit securities for the protection of such funds. 12 U.S.C.A. § 248(k).

"As a business proposition, such deposits may enable the trustee to do a good service to the trust estates at less expense.

"All this is to demonstrate the policy of our laws in disapproving transactions by such trustees where the personal interest of the trustee is at variance with the interest of those whom he represents in trust relations; *and to uphold transactions in the common interest of the trustee and trust estates in his keeping.* Equity rules are to be applied in recognition of this policy, and deal with realities, not matters of form merely." (Emphasis added.)

Since the trial court found the bank was not disloyal, I believe that this finding, under Alabama law and under the terms of the trust instrument, was a defense against the "conflict of interest" charge.

The conduct of fiduciary business by a national bank is governed by federal law and regulations.

Under the facts of this case, what federal law was applicable? Let's examine the facts and apply the law. The management of the bank had decided to consolidate. Since the bank held shares of its own stock as trustee, it could not vote the shares in the consolidation proceeding, because Tit. 12, § 61, U.S.C., prohibited it from voting these trust shares. That section provides, in part:

"In all elections of directors, each shareholder shall

have the right to vote the number of shares owned by him for as many persons as there are directors to be elected, or to cumulate such shares and give one candidate as many votes as the number of directors multiplied by the number of his shares shall equal, or to distribute them on the same principle among as many candidates as he shall think fit; *and in deciding all other questions at meetings of shareholders, each shareholder shall be entitled to one vote on each share of stock held by him;* * * * and (3) shares of its own stock held by a national bank and one or more persons as trustees may be voted by such other person or persons, as trustees, *in the same manner as if he or they were the sole trustee.* * * * Whenever shares of stock cannot be voted by reason of being held by the bank as sole trustee such shares shall be excluded in determining whether matters voted upon by the shareholders were adopted by the requisite percentage of shares." (Emphasis added.)

As I read this statute, when the question of merger came up, this section prohibited the bank from voting the trust stock. However, the statute specifically permitted Henley, as co-trustee, to vote this stock. Henley, acting under this statute, actually voted every share of the trust stock *against* the merger, as he had a legal right to do acting as he was under the statute as the "sole trustee." A reading of Tit. 12, § 61, convinces me that when a national bank holds shares of its own stock as sole trustee, it cannot vote the stock and these shares are excluded in determining whether matters voted upon by the shareholders were adopted by the requisite percentage of shares. I believe this portion of Tit. 12, § 61, U.S.C., was added by Congress to the National Banking Act in 1966 to prevent an inequity. If shares so held by a bank in trust could not be voted, and were not excluded, voting rights belonging to the beneficiaries of the trust would, in ef-

fect, be given to the remaining shareholders. cf. *Cleveland Trust Co. v. Eaton,* 21 Ohio St. 2d 129, 256 N.E.2d 198 (1970). When shares of its own stock are held by a national bank and one or more persons as trustees, then the other person or persons may vote the stock in the same manner as if he or they were the *sole trustee*.

Henley, acting as *sole trustee*, became a *dissenting shareholder,* pursuant to federal law. The critical question at this point was: what duty did the bank have with regard to the trust? The majority seems to say, in effect, that the bank should have supported Henley's dissent even though it was against its business judgment. I disagree. Federal law prohibited the bank from *voting* the stock. Was the bank under a duty to support Henley's dissent, even though it, acting in good faith, thought his dissent was not in the best interest of the trust? I think not. If Henley had not dissented, the BTNB stock would have been exchanged for the "new" bank stock. Does the bank fail to give undivided loyalty to the trust by disagreeing with a business judgment exercised by a co-trustee, who is statutorily empowered to vote the shares as a "sole trustee?" I think not. I believe that federal law sufficiently protected this trust but even if I did not think that, I believe that this Court should consider this case in the light of the finding by the trial court of an absence of bad faith on the part of the bank.

In any event, when Henley decided to dissent, I believe that he became a "dissenting stockholder" under the provisions of federal law and from that point forward, national law provided, in detail, the procedure which had to be followed to determine the value of the shares. Tit. 12, § 215(b), U.S.C., provides, in part, that when a shareholder dissents from a plan of consolidation, he "shall be entitled to receive the value of the shares so held by him when such consolidation is approved by the

Comptroller * * *." The valuation of the shares is governed by national law. Tit. 12, § 215(c) provides:

"Valuation of Shares

"(c) The value of the shares of any dissenting shareholder shall be ascertained, as of the effective date of the consolidation, by an appraisal made by a committee of three persons, composed of (1) one selected by the vote of the holders of the majority of the stock, the owners of which are entitled to payment in cash; (2) one selected by the directors of the consolidated banking association; and (3) one selected by the two so selected. The valuation agreed upon by any two of the three appraisers shall govern. If the value so fixed shall not be satisfactory to any dissenting shareholder who has requested payment, that shareholder may, within five days after being notified of the appraised value of his shares, appeal to the Comptroller, who shall cause a reappraisal to be made which shall be final and binding as to the value of the shares of the appellant.

Appraisal by Comptroller; expenses of consolidated association; sale and resale of shares; State appraisal and consolidation law.

"(d) If, within ninety days from the date of consummation of the consolidation, for any reason one or more of the appraisers is not selected as herein provided, or the appraisers fail to determine the value of such shares, the Comptroller shall upon written request of any interested party cause an appraisal to be made *which shall be final and binding on all parties*. The expenses of the Comptroller in making the reappraisal or the appraisal, as the case may be, shall be paid by the consolidated banking association. The value of the

shares ascertained shall be promptly paid to the dissenting shareholders by the consolidated banking association. Within thirty days after payment has been made to all dissenting shareholders as provided for in this section the shares of stock of the consolidated banking association which would have been delivered to such dissenting shareholders had they not requested payment shall be sold by the *consolidated banking association at an advertised public auction, unless some other method of sale is approved by the Comptroller, and the consolidated banking association shall have the right to purchase any of such shares at such public auction, if it is the highest bidder therefor, for the purpose of reselling such shares within thirty days thereafter to such person or persons and at such price not less than par as its board of directors by resolution may determine.* If the shares are sold at public auction at a price greater than the amount paid to the dissenting shareholders the excess in such sale price shall be paid to such shareholders. The appraisal of such shares of stock in any State bank shall be determined in the manner prescribed by the law of the State in such cases, rather than as provided in this section, if such provision is made in the State law; and no such consolidation shall be in contravention of the law of the State under which such bank is incorporated. (Emphasis added.)

As I read the majority opinion, it does not say that the bank failed to follow the procedure outlined in the national banking laws and regulations. Procedurally, the bank did nothing that was not allowed under national banking laws in consolidation proceedings involving dissenting shareholders. Even Professor Scott, who has been accused of developing the stringent conflict of interest rule [see, Notes and Comments: *Trusts: The Rule of Undivided Loyalty–Corporate trustees holding their own*

shares, 33 Cornell L.Q. 616 (1948), agrees that this is true.] He says:

"Corporate trustees are subject to many regulations which are inapplicable to individual trustees. Thus the trust departments of state banks and trust companies are subject to the supervision of the banking authorities of the state. Frequently there is legislation regulating the duties of corporate trustees and the method of their conduct of trust business. The conduct of fiduciary business by national banks is governed by the Federal Reserve Act, § 11(k), and by Regulations issued in pursuance of the Act. Regulation F of the Board of Governors of the Federal Reserve system is now superseded by Regulation 9 of the Comptroller of the Currency.

"Although a state which permits trust companies or banks to act as fiduciaries cannot prevent national banks within the state from exercising fiduciary powers, a national bank acting as trustee is subject to the laws of the state, except insofar as these laws may conflict with federal laws or regulations or interfere with the purpose of Congress in permitting national banks to exercise fiduciary powers."

Of course, federal law would not protect self-dealing, and for that matter, neither would Alabama law, where the personal interest of a trustee is at variance with the interest of those whom he represents in trust relations. As I read the federal law, it is designed to prevent conflicts of interest when a bank trustee holds shares of its own stock in trust. I believe that a trustee bank which follows federal regulations, in good faith, could not be guilty of a breach of trust. In other words, when a national bank acts pursuant to federal law in merger proceedings, without disloyalty to the trust, as the trial court found in this case, then I believe that this Court could not

remove a national bank as trustee so long as it was acting in good faith in following federal laws and regulations. [*cf. First National Bank v. Fellows,* 244 U.S. 416, 37 S.Ct. 734, 61 L.Ed. 1233 (1917).]

Court decides question not raised.

I believe the Court exceeds its appellate jurisdiction when it decides that Henley was also disloyal. The trial court entered no judgment on this issue. In the absence of a finding of bad faith by the trial court, I would not reach this issue. This Court's finding of disloyalty by Henley raises serious questions. Could the Attorney General, or should he, in view of the suggestion given in the majority opinion that he should actively participate, file proceedings against Henley for surcharge?

It appears to me that Henley, under the trust instrument, had the same powers and duties BTNB had. I would apply the same principles of law to Henley's actions as I would to BTNB's—that is, if that were before me. I believe that with regard to the purchase by the trust of the Birmingham Realty Company stock, the trial court has not found BTNB disloyal. The trial judge made no finding with regard to whether Henley was acting in good faith and in the best interest of the trust or for his own personal advantage in this matter. I fail to find in the record before us that Henley's loyalty was made an issue at the trial level. Consequently, I fail to see how this Court can reach it. Furthermore, to find Henley guilty of a breach of trust without allowing him an opportunity to defend raises serious due process questions.

This Court cannot direct the exercise of an act of executive discretion.

The attorney general appeared in this proceeding, at the beginning of the trial with three attorneys, but took little active interest except to ask the court to protect the beneficiaries of the trust. I question whether this Court should suggest to the Attorney General how he must represent the beneficiaries of this trust. He is a constitutional officer and is vested with executive discretion.

Summary

The effect of the majority decision, I fear, means that every bank which is serving as a sole trustee or as a co-trustee of a trust containing shares of its own stock, would have to, at least temporarily, remove itself during the course of every consolidation proceeding. I cannot believe this is the law. In short, I think the matter of self-dealing and consolidation, are dealt with by federal law and by regulations promulgated by the comptroller of the currency. See, 12 C.F.R., § 9.12. I believe that when a trustee bank acts in good faith, and follows the procedures required by federal law, this Court should not find that the trustee bank breached its duty. In other words, it would seem to me that when an individual co-trustee decides to exercise rights granted to him by federal law "in a manner as if he or they were the sole trustee," the co-trustee, acting as the sole trustee, must bear the commensurate responsibilities of a sole trustee. If the bank had been sole trustee, the bank shares would have been excluded in determining whether the other shareholders voted for or against merger by the required percentage.

The principles I would apply would seem to be especially true in this case, since we are dealing with a charita-

ble trust. Section 383, Restatement of Trusts 2d, provides that if there are several trustees of a charitable trust, the powers conferred on them can properly be exercised by a majority of the trustees, unless it is otherwise provided by the terms of the trust. In other words, in this case, federal law permitted the co-trustee of this charitable trust to exercise the powers which had been initially conferred upon the co-trustees. Henley decided to dissent from the merger. I cannot say whether his judgment was good or bad. I do believe, however, that under the trust instrument in this case, both trustees had the power and discretion to act, irrespective of their adverse interests, so long as they exercised their powers and discretions in the best interest of the trust. *First National Bank of Birmingham v. Basham,* supra.

When Henley dissented and the bank was put in a conflict of interest position, under federal law, Alabama law, and the terms of the trust instrument, the bank had to exercise good faith. The trial court found the bank was not disloyal, as a matter of fact.

In view of the above, I would affirm the judgment of the trial court which found that the bank was not disloyal to the trust.

HEFLIN, Chief Justice (dissenting):

While I don't completely agree with all the language and all of the conclusions of law contained in Justice Maddox' dissenting opinion, I am in general agreement with it.

In my opinion, the Congress of the United States anticipated the problems which arose in this case. Congress anticipated that conflicts of interest could easily arise between a bank trustee and an individual co-trustee and that charges and countercharges of disloyalty to the trust

and its beneficiaries could be present in a merger reorganization of a *national* bank where the trust held stock in that bank. Therefore, Congress provided procedures to meet the anticipated problems, including the valuation of bank stock held by a trust of which the merging bank was one of the trustees.

After reviewing the majority opinion I have concluded that the majority finds that the only real breach of BTNB's trust duties involved in the merger reorganization was that BTNB breached its fiduciary relationship in failing to submit valuation data to the Comptroller of the Currency. Since an appraisal was made by the comptroller and public auctions of the stock were held, strict compliance with the requirements concerning the appointment of the three appraisers and with other preliminary steps was made moot. My colleagues of the majority fail to realize that Congress placed a duty on the comptroller to make the appraisal of the value of the stock. The choice of the comptroller to make the appraisal was not by chance. Who else other than the comptroller would have access to all of the records of the bank and the authority to demand and acquire information which might affect valuations?

In my judgment, Congress intended that the federal law would preempt the state law as to the details and the procedure of a merger of a *national* bank, including the procedure of determining the value of the stock of a dissenting trust of which the merging bank was one of the trustees. If not, why did Congress specify such a detailed and protective procedure? See *Rogers v. First National Bank of St. George,* 297 F.Supp. 641 (D.S.C.), aff'd 410 F.2d 579 (4th Cir. 1969).

The majority cites one other breach of the bank-trustee's responsibility—the failure to buy stock in a cor-

poration when the individual co-trustee recommends the purchase.

The bank in this instance gave many valid reasons why stock in the Birmingham Realty Company should not be purchased. The trial court heard the evidence ore tenus. I do not find from the evidence that the decision of the trial court was plainly erroneous or manifestly unjust. *Kubiszyn v. Bradley,* 292 Ala. 570, 298 So.2d 9 (1974). In *Dougherty v. Gulf Shores Motel,* 292 Ala. 252, 254, 292 So.2d 454, 456 (1974), this court said:

> "Where the evidence is heard orally before the trial court, the finding of the court has the effect of a jury's verdict and will not be disturbed on appeal unless plainly erroneous. And we must affirm the trial court's decree if fairly supported by credible evidence under any reasonable aspect, regardless of what might be our view of the evidence. *Lott v. Keith,* 286 Ala. 431, 241 So.2d 104; *Norton v. Norton,* 280 Ala. 307, 193 So.2d 750."

It is difficult to understand how the majority of this court can reach the issue of a breach of trust duties by John C. Henley, III, the individual co-trustee. The trial court didn't mention any such breach in its decree. There is no urging by cross appeal or otherwise from any party to this cause that this court should make such a finding.

I am in agreement with Justice Maddox in his treatment of the Attorney General issue.

I would affirm the decree of the trial court.

ON REHEARING

JONES, Justice.

Opinion corrected.

Application for rehearing overruled.

MERRILL, ALMON, and EMBRY, JJ., concur.

SHORES, J., concurs in the result.

HEFLIN, C. J., and MADDOX, J., dissent.

BLOODWORTH and FAULKNER, JJ., not sitting.

Supreme Court, U. S.
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IN THE

Supreme Court of The United States

October Term, 1978
No. 79-374

BIRMINGHAM TRUST NATIONAL BANK,
Petitioner,

v.

JACK H. HARRISON, Temporary Trustee of the Linn-Henley Charitable Trust; CHARLES A. GRADDICK, Attorney General of the State of Alabama; and JOHN C. HENLEY, III,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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October 29, 1979

In The

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October Term, 1978

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BIRMINGHAM TRUST NATIONAL BANK,

Petitioner,

v.

JACK H. HARRISON, Temporary Trustee of the Linn-Henley Charitable Trust; CHARLES A GRADDICK, Attorney General of the State of Alabama; and JOHN C. HENLEY, III,

Respondents,

Brief in Opposition to Petition for Writ of Certiorari

The purpose of this argument is to answer each of the arguments contained in the Reasons for Granting the Writ in the Petition filed by Birmingham Trust National Bank; to seek to persuade the Court to deny the Petition for Certiorari; to convince the Court that there is no conflict of decisions; to show the Court that the decision is not important; and, to show the Court that the decision below was correct.

Petitioner, hereinafter referred to as "BTNB", in brief summary, has asked this Court to hold that the decision of the Alabama Court conflicts with applicable decisions of this Court concerning the controlling effect of federal law, the reviewability of administrative determinations

that are committed to a "final and binding" determination by an administrative official, and the attacking of these administrative determinations in collateral proceedings. Petitioner has further sought to show that the decision below represents the only available judicial statement on the kinds of evidence that may be considered in determining the "value" of national bank stock under 12 USC 215a (c) and (d) and that the decision below reaches a result that allows dissenters to reap benefits from the subsequent success of an enterprise that they chose to abandon. Each of these arguments are totally without merit.

The decision below arose from the trial court's finding that petitioner, a national bank, breached its fiduciary duty to the trust in several and various ways. The gravaman of the complaint on behalf of the trust was not, as BTNB states, the supposedly inadequate amount fixed by the Comptroller in his appraisal of the old bank stock; instead, the gravaman, or grievance, specially complained of was various charges of fiduciary abuse suffered by the trust at the hands of BTNB, including, but certainly not limited to, such grievances as the failure to provide certain necessary information to the Comptroller regarding the appraisal, the failure by BTNB to purchase for the trust certain stock offered at auction, the failure by BTNB to concur in the co-trustee's recommendation to purchase certain other common stock and BTNB's breach of its fiduciary duty to the trust by engaging, for their own benefit and at the expense of the trust, in actions of self-dealing, trickery, intentional hampering, and acts of economic threats and actual reprisals directed at the co-trustee. Simply stated, the gravaman of the complaint on behalf of the trust was continued and prolonged breaches of fiduciary duty by petitioner towards the trust, all for the benefit of the BTNB and at the expense of the trust.

The lower court's decision in the instant case dealt explicitly with the issue which was before it--the fidelity vel non of a co-trustee. The lower court dealt with a breach of fiduciary duty in the context of the law of trust, not in the context of those duties owed by a bank to its dissenting stockholders absent the trustee relationship. This is the point BTNB seems to omit. We point out that we are not dealing with a review by the lower court of a finding by the Comptroller but instead with a review of the fidelity vel non of the co-trustee, BTNB, in the context of the law of trust.

BTNB recognizes in brief that national banks are subject to state law unless these state laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions. This court has more than once held that the national bank organized under the Acts of Congress are subject to state supervision, except where such supervision is in conflict with some Act of Congress or where it tends to impair or destroy the utility of such banks, as agents or instrumentalities of the United States, or interferes with the purposes of the their creation. Waite v. Dowley, 94 U.S. 527, 533, 24 L. Ed. 181, 182 (1877); Anderson National Bank v. Luckett, 321 U. S. 233, 88, L. Ed. 692 (1944). Additionally, the act in question, 12 USC 215, implicitly recognizes the proposition that a national bank acting as a fiduciary under appointment by a state court is subject to supervision or removal by that court, saying, at 12 USC 215 a (f):

> "...nothing contained in this section (215) shall be considered to impair in any manner the right of any court to remove the consolidated national banking association and to appoint in lieu thereof a substitute... fiduciary except that such right shall not be exercised in such a manner as to discriminate against national banking associations,

nor any consolidated national banking association be removed solely because of the fact that it is a national banking association."

Thus, state courts are not foreclosed by 12 USC 215 to decide the question of breach of fiduciary duty by a national bank involved in merger as provided for by that act. The state law is controlling, insofar as it does not conflict with some Act of Congress or tend to impair the utility of such banks as instrumentalities of the United States or interfere with the purposes of their creation. There has been no showing by BTNB, nor does any exist, that the decision by the lower court under state law has impaired the utility of BTNB as an instrumentality of the United States or that it interferes with the purposes of BTNB's creation. State law is controlling in this regard.

Regardless of the fact that the lower court based its review on the fidelity vel non of a co-trustee, and not on a review of the Comptroller's finding, BTNB asserts that the Comptroller's appraisal shall be "final and binding", and that the "value" fixed by the Comptroller should fully protect shareholders who are dissatisfied with the merger. BTNB even states that the terminology "shall be final and binding" is plain enough and that it is entirely consistant with the broad supervisory powers given the Comptroller over national banks that Congress would also intend that the Comptroller have the final say on this question of valuation. Such could not be further from a correct statement of the law.

It is contended here that the "final and binding" provisions of an Act of Congress pertaining to administrative boards applies only to administrative finality. Brownell v. Tom We Shung, 352 U.S. 180, 1 L. Ed 2d 225, 229 (1956). If Congress had intended these "final and binding" or "final and conclusive" terminologies to preclude judicial review,

Congress would have expressly stated such. For instance, in several Congressional statutes dealing with veteran's benefits, Congress did not stop with the words "final and conclusive", but continued with the terminology that, "and no other official or any court of the United States shall have power or jurisdiction to review any such decisions." Davis, Administrative Law Treatise, section 28.15, p. 77, f.n. 1.

It is imperative to point out that such terminology is not, as BTNB states, "plain enough", nor would Congress intend, under facts such as exist here, that the Comptroller would have the final say on this question of valuation. Where, as here, one co-trustee has breached its fiduciary duty to the trust by failing to provide adequate data to the Comptroller which would have resulted in a higher appraisal of the old bank stock than that originally fixed, is the state court reviewing the act of such co-trustee to be bound by such administrative finality? Of course not! It cannot be supposed that Congress intended by 12 USC 215 with its finality provisions to condone all frauds or to prevent the correction of mistakes or errors. Had Congress so intended, they would have specifically so stated. Fundamental principles of our jurisprudence insist that there be some type of review of final, substantive agency action which seriously impairs or affects personal or property rights. Gardner v. Toilet Goods Association, 387 U.S. 167, 18 L. Ed. 2d 704, 711, (1967). To hold that the terminology "final and binding" is "plain enough" and that the Comptroller has the final say at all times on the question of valuation would smack directly in the face of existing law. Such finality provisions apply only to administrative finality. Brownell v. Tom We Shung, 352 U.S. 180, 1 L. Ed. 2d 225, 229 (1956). It is contended here that the statutory provision that a decision of the administrative agency shall be "final and binding" means only that the decision is final when it

has been arrived at by a legally constituted agency, in a legal manner, pursuant to competent evidence, without the abuse of discretion, and is not arbitrary or fraudulent. It is further contended that the words, as used in 12 USC 215, contemplate that the decision shall be final in that agency or department so that the higher eschelons of the government office will not be burdened with the duty of reviewing it and does not take away the aggrieved party's right of redress in the courts. Bryan v. Union Oil, 155 F. 2d 625, 627, (CCA 9, 1946) (statute making final the decision of the Commissioner of Navigation on questions relating to collection and refund of tonnage tax).

BTNB continues this line of argument by asserting that the decision below, as a review of the Comptroller's finding, represents the only available judicial statement on the kinds of evidence that may be considered in determining the "value" of national bank stock in situations involving dissents from the mergers of national banks.

The trial court was instructed, on order for a new trial, to ascertain what data should have been made available to the Comptroller but for the conflict of interest which existed. From this data, the trial court was directed to ascertain the value of the "old bank" stock. The findings of the court below as to such data and the valuation of the stocks are grounded upon criteria and material factors which have been established by numerous decisions. See in this regard Ahlenius v. Bunn and Humphreys, 358 Ill. 155, 192 N.E. 824, 95 ALR 913; also, Ann. 48 ALR 3d 430.

The trial court properly considered all relevant facts, including the facts that BTNB would continue as an ongoing concern, the future prospects and growth potentiial of the bank, an estimate of its future earnings and payment of dividends, the expected growth of the bank in earnings and dividends for the future, and the plans and goals which were known, or should have been known to the management of BTNB. The ascertainment of value is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts. Standard Oil Company v. Southern Pacific Company, 268 U.S. 146, 156, 69 L. Ed. 890 (1925).

Even in the hands of expert appraisers, valuation is often complex and difficult. For this reason, our Courts generally recognize that valuations of stocks contemplate economic, rather than legal, questions and that these questions, often complex since they vary with each case, should be left to qualified appraisers who are knowledgeable about corporate securities and finance. Jeffrey v. American Screw Company, 98 R.I. 286, 201 A. 2d 146, 152 (1964). Furthermore, deference to the expertise of the appraisers is inevitable, and Courts have been reluctant to disturb the appraisers' findings unless the figures are arbitrary or based on unreasonable premises. "Valuation of Dissenters' Stock Under Appraisal Statutes", 79 Harv. L. Rev. 1453. Each of these admonitions was adhered to in the instant case.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

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Supreme Court, U.S.
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Nos. 79-374 and 79-386

In the Supreme Court of the United States

OCTOBER TERM, 1979

BIRMINGHAM TRUST NATIONAL BANK, PETITIONER

v.

JACK H. HARRISON, ET AL.

JACK H. HARRISON, PETITIONER

v.

BIRMINGHAM TRUST NATIONAL BANK, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether the Comptroller of the Currency's appraisal of the value of national bank stock held in trust precludes a state court from awarding damages (in-

cremental to a payment for the stock in the amount calculated in the Comptroller's appraisal) based on a bank trustee's breach of fiduciary duty to the trust in connection with the appraisal (BTNB Pet.).

2. Whether the state court erred in failing to give effect to the trust's claims of violation of federal banking law and federal securities law in determining whether the bank trustee breached its fiduciary duty under state law (Harrison Pet.).

STATEMENT

1. The present litigation arises from a dispute between the two co-trustees of a testamentary charitable trust, known as the Linn-Henley Charitable Trust (Trust). Petitioner Birmingham Trust National Bank (BTNB) is the corporate trustee; John C. Henley, III is the co-trustee. The Trust owned a substantial block of BTNB stock that amounted to approximately 50% of the assets of the Trust (BTNB Pet. App. 29, 67).

In 1968, BTNB decided to reorganize the bank for the purpose of forming a one-bank holding company. Shareholder proxies were solicited for approval of the plan. The proxy materials described the reorganization as falling within the statutory merger provisions of the National Bank Act, but omitted any reference to the appraisal rights of dissenting shareholders. No registration statement under the Securities Act of 1933 was filed for the holding company stock offered in exchange for the shares of the bank.[1] The shareholders subsequently approved the reorganization, although Henley voted the

[1]Apparently no registration statement was filed in reliance on the exclusion from the Securities Act registration requirements provided under former Commission Rule 133, 17 C.F.R. 230.133, for certain statutory mergers. See *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 465-466 (1969).

Trust shares against the transaction. The Comptroller of the Currency (the federal official charged with supervision of national banks) gave his approval of the reorganization and it became effective shortly thereafter (BTNB Pet. App. 30).

Henley informed BTNB of his view that the Trust should dissent from the merger (BTNB Pet. App. 69).[2] However, the co-trustees were unable to agree that this action was in the best interests of the Trust. Neither trustee petitioned the Alabama courts for instructions as to what steps to take to protect the Trust's interests in view of the disagreement concerning the reorganization (*id.* at 73-74).[3] Moreover, neither trustee invoked the statutory appraisal remedy under 12 U.S.C. 215a(c) or (d) (*id.* at 31, 70-71). Nine months after the effective date

[2]The rights of dissenting stockholders are set forth in 12 U.S.C. 215a. Basically the dissent procedure calls for surrender of the stockholder's shares followed by an appraisal to determine their value. There is a provision for the parties to appoint appraisers but, if the appraisal is not completed within 90 days, either party may request the Comptroller to appraise the stock surrendered by the dissenter. The statute provides that the Comptroller's appraisal shall be final and binding on all parties. The national bank that survives the merger is required to pay dissenters for their stock at the appraised value. The final step in the dissent process requires the surviving national bank to sell at public auction the stock that would have been delivered to the dissenting stockholders had they not dissented. The surviving bank is permitted to buy the stock offered at this auction but, if it does, it must dispose of the stock in some manner within 30 days. If the auction sale of the stock yields more than the appraised value of the shares surrendered, the excess over the appraised value is paid to the dissenters.

[3]The trustee may apply to a court of equity for directions or instructions when a reasonable doubt exists as to the proper administration of a charitable trust. See, *e.g.*, *Gilmer* v. *Gilmer*, 245 Ala. 450, 17 So.2d 529 (1944).

of the reorganization, BTNB agreed that the Trust could exercise its right as a dissenting stockholder and requested the Comptroller to appraise the Trust's shares.

The Comptroller requested financial information needed for the appraisal, which BTNB provided. It withheld, however, additional information that would have improved the accuracy of the appraisal (BTNB Pet. App. 36-38, 48). Henley, who had employed separate counsel for the Trust, asked BTNB to provide internal audits relevant to the appraisal process but, upon BTNB's refusal, did not submit any information to the Comptroller (*id.* at 75-76).

The Comptroller subsequently reported his appraisal, concluding that, at the effective date of the merger, the stock of BTNB had a value of $32.80 per share, resulting in a total value of $900,688 for the 27,460 shares of BTNB stock held in Trust. That sum was paid to the Trust and was accepted by Henley on behalf of the Trust. The BTNB stock was then surrendered by the Trust (BTNB Pet. App. 31).

After making this payment, BTNB proceeded to hold an auction sale as required by 12 U.S.C. 215a(d). With the approval of the Comptroller, the Bank first advertised an auction for 27,460 shares of the holding company stock. No registration statement was filed under the Securities Act prior to the offer and sale of the stock. Shortly before the date of the sale, Henley urged that the stock be purchased on behalf of the Trust. BTNB did not agree to this proposal. The only bidder for the holding company stock was the holding company

itself. It purchased 27,460 shares of its own stock at $26 per share (BTNB Pet. App. 31-32).[4]

2. Following the auctions, Henley asserted various claims that BTNB had violated the law in connection with the reorganization (BTNB Pet. App. 72). In response, BTNB petitioned the Alabama circuit court for instructions and ratification of its prior actions (*ibid.*). Henley counterclaimed in that action, alleging, *inter alia*, that BTNB had breached its fiduciary duty to the Trust in failing to provide the Comptroller with sufficient information upon which to base his appraisal (*id.* at 74-78) and in not conducting a bona fide public auction as required by the National Bank Act (*id.* at 82).

The trial court found no breach of fiduciary duty on the part of BTNB, although it criticized BTNB for failing to petition for instructions prior to taking the challenged actions (BTNB Pet. App. 73-74). Henley appealed to the Supreme Court of Alabama, which reversed the decision of the circuit court. *Henley* v. *Birmingham Trust National Bank*, 295 Ala. 38, 322 So.2d 688 (1975). The court concluded that BTNB had breached its fiduciary duty to the Trust in failing to provide the Comptroller with material information needed for the appraisal. The court rejected BTNB's contention that the Comptroller's appraisal preempted the Trust's claim of breach of

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[4]Uncertain that it had auctioned the right stock, BTNB later held a second auction at which 27,460 shares of "new" BTNB (the surviving bank) stock was sold. Again, the only bid was made by the holding company, this time at $24 per share. Because these were securities issued by a national bank, they were exempt from registration under the Securities Act of 1933. See Section 3(a)(2) of the Act, 15 U.S.C. 77c(a)(2). Since neither auction produced a bid in excess of $32.80 per share, there was no further payment by BTNB to the Trust (BTNB Pet. App. 32).

fiduciary duty under state law (BTNB Pet. App. 76-78). It then remanded the case to the circuit court with directions to make certain findings and an award of damages and specified that a temporary trustee should be appointed for the Trust in lieu of the named trustees.[5]

On remand, the temporary trustee asserted additional claims on behalf of the Trust, including allegations that BTNB had violated the federal securities laws and that such violations should be considered as evidence of BTNB's breach of fiduciary duty (see note 8, *infra*). The trial court made the following award of damages to the Trust:

(1) $703,272, plus interest, based on BTNB's failure to provide information material to the appraisal to the Comptroller of the Currency (BTNB Pet. App. 38-39, 43-44); and

(2) $1,208,240, based on BTNB's refusal to permit the Trust to purchase stock sold at the public auction (*id.* at 41-42, 44).

Both trustees filed a second appeal to the Alabama Supreme Court. The court affirmed the first award and reversed the second. The court upheld the award of damages based on BTNB's actions in connection with the appraisal, reaffirming its prior decision on the question of liability (BTNB Pet. App. 46-48). However, it set aside the award of damages based on BTNB's failure to bid for the holding company's shares on behalf of the Trust (*id.* at 48-52). The court explained that Alabama law precludes a trustee from bidding for its own shares

[5]Cross-petitioner Jack H. Harrison is the temporary trustee of the Trust, having been appointed pursuant to the mandate of the Alabama Supreme Court.

at auctions unless authorized by the settlor of the trust and concluded that BTNB did not abuse its discretion in refusing to buy the holding company's shares as a trust investment (*ibid.*). The court did not mention the federal securities law issues raised by the temporary trustee, disposing of the case under state trust law principles.

DISCUSSION

Both petitions should be denied because the decision of the court below does not present federal questions of sufficient importance to warrant review by this Court.

1. Petitioner BTNB contends (Pet. 12-20) that the Alabama Supreme Court has undermined the Comptroller's appraisal, since it has upheld an award of damages to the Trust that increases the amount of money found to be due by the Comptroller. However, the court below did not purport directly to review the Comptroller's appraisal, and it did not set the appraisal aside (BTNB Pet. App. 46-47). Instead, it awarded damages to the Trust under state trust law principles based on a breach of fiduciary duty. In our view, such an award under state law is entirely appropriate and not foreclosed by the language of the appraisal statute, 12 U.S.C. 215a(d). If the decision were a direct challenge to the Comptroller's appraisal, which is "final and binding on all parties," we would, of course, adopt a different position.[6] We also note that the question presented by petitioner BTNB arises only because a merging bank is also a co-trustee of a trust which, as a shareholder, has

[6]In *Simonds* v. *Guaranty Bank & Trust Co.*, No. 74-1105-K (D. Mass.), the Comptroller is defending a direct challenge to the "final and binding" status of his appraisal. The plaintiff in that case seeks judicial review of the appraisal, which the Comptroller contends is foreclosed by 12 U.S.C. 215a(d).

dissented from the merger. Because the convergence of these facts is unusual, the issue is not likely to be a recurrent one of general importance.

2. Petitioner Harrison challenges (Pet. 20-28) the reversal of the award of damages to the Trust for breach of fiduciary duty stemming from BTNB's refusal to permit the Trust to bid for shares at the public auction. He argues that the Alabama Supreme Court either did not consider or erroneously evaluated his claims of violations of federal banking and securities laws. He also argues that BTNB's merger plan itself was illegal under the federal banking and securities laws.

In our view, however, the court below did not misapply federal law because the Trust's allegations of violation of federal law were merely presented as examples of BTNB's breach of fiduciary duty under state law. See Harrison Pet. 18; Harrison Pet. App. A-59, A-60. Thus, the alleged federal law violations were not raised as separate federal causes of action that the Alabama Supreme Court was required to adjudicate apart from the state law question of breach of fiduciary duty.

In any event, even if petitioner had raised the invalidity of the merger in a separate cause of action, our view would be that the Comptroller's decision approving the bank reorganization was entirely proper. 12 U.S.C. 215a authorizes the triangular or "phantom bank" merger utilized by BTNB. Such a transaction is a corporate reorganization achieved by a merger of two national banks to which the literal terms of the statute apply. The Comptroller's interpretation of the statute is

well established and is reflected in the long-standing administrative practice of chartering new or "phantom" banks to facilitate mergers which result in the formation of one-bank holding companies.[7]

We do not believe that petitioner's federal securities law claims raise questions of sufficient importance to merit review by this Court, even if they were, and properly could be, pleaded as separate causes of action in the Alabama court.[8]

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[7]Indeed, the Comptroller's latest Annual Report shows that 25 national banks were chartered in 1978 pursuant to corporate reorganizations. Comptroller of the Currency, *1978 Annual Report* 12 (Table 5).

Assuming arguendo that the challenge to the merger was raised as a separate cause of action, we note that Henley waited nearly three years to raise it—from November 25, 1968 (when the Comptroller approved the reorganization) to October 6, 1971 (when BTNB filed its petition for ratification and instructions). Such a belated claim might well be barred by laches.

[8]Six securities claims are discussed in the Harrison petition. First, petitioner claims that Section 5 of the Securities Act of 1933, 15 U.S.C. 77e, was violated when shares of the holding company were offered in exchange for shares of "old" BTNB without a registration statement having been filed under the Securities Act of 1933. This claim is premised on the view that the statutory merger provisions of the National Bank Act, 12 U.S.C. 215a, did not apply to the transaction and, therefore, the exclusion from the requirements of Section 5 contained in former Commission Rule 133 (rescinded effective January 1, 1973) was inapplicable (Harrison Pet. 22-23). Second, petitioner claims that the proxy solicitation, falsely stating that the statutory merger provisions of the National Bank Act applied to this merger, violated Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Commission Rule 10b-5 thereunder, 17 C.F.R. 240.10b-5 (Harrison Pet. 24). Third, petitioner claims that the proxy solicitation violated Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78n(a), by omitting Item 9 of Schedule B of the proxy regulations of the Comptroller of the Currency (Harrison Pet. 4). Fourth, petitioner claims that Section 5 of the Securities Act of 1933 was violated when the holding company shares were sold at a public auction by "new" BTNB, without registration of the shares under the Securities Act of 1933 (Harrison Pet. 23). Fifth, petitioner claims that the public

CONCLUSION

The petitions for a writ of certiorari should be denied.

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auction of unregistered shares constituted a violation of Section 10(b) of the Securities Exchange Act of 1934 and Commission Rule 10b-5 thereunder (Harrison Pet. 24). Sixth, petitioner claims that this alleged violation of the Securities Exchange Act of 1934 rendered void the contract of sale at the auction pursuant to Section 29(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78cc(b) (Harrison Pet. 27-28).

We view petitioner's claims premised on the purported invalidity of the BTNB bank merger as insubstantial for the reasons previously discussed. Petitioner's claims under the Securities Exchange Act of 1934, asserted in a counterclaim as separate causes of action rather than defenses, were not properly presented in state court. Claims based on violations of the Securities Exchange Act of 1934 must be filed in federal court. See Section 27 of the Act, 15 U.S.C. 78aa. As to petitioner's claims of violation of Section 5 of the Securities Act of 1933, we note that Section 12 of the Act, 15 U.S.C. 77*l*, which provides a private remedy for such violations, is available only to purchasers. See also Section 13, 15 U.S.C. 77m, which provides a one year statute of limitations for actions under Section 12(1).

In light of these considerations, we do not believe petitioner's claim that the Supremacy Clause required the Alabama courts to redress breaches of fiduciary duty evidenced by violations of federal securities law raises an issue of sufficient importance, in the context of this case, to warrant review by this Court.

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RESPONSE OF BIRMINGHAM TRUST NATIONAL BANK TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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RESPONSE OF BIRMINGHAM TRUST NATIONAL BANK TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

A.

Apparently with the concurrence of the Comptroller of the Currency ("Comptroller"), the Solicitor Gen-

eral recommends denying BTNB's petition in No. 79-374 because the Alabama Supreme Court has not *openly admitted* that it has attacked, and effectively overruled, the Comptroller's appraisal of the Trust's stock. The narrow basis for the Solicitor General's recommendation is made clear by his qualifying statement that "If the decision were a direct challenge to the Comptroller's appraisal . . . we would, of course, adopt a different position," and by the accompanying footnote 6. (Sol. Gen. Br., p. 7)

It is difficult to understand the Solicitor General's acceptance of the characterization given by the Alabama Supreme Court to its holding, while ignoring its real effect. He seems to believe, naively we submit, that future readers of the opinion below will not perceive how neatly the Alabama Court has nullified the Comptroller's action.

In *Simonds v. Guaranty Bank & Trust Co.*, which the Solicitor General implies he would urge this Court to review if the lower courts should fail to uphold the finality of the Comptroller's appraisal (see fn. 6, Sol. Gen. Br., p. 7), a dissenting stockholder, being dissatisfied with the amount of the Comptroller's appraisal, seeks (a) to set aside the award and (b) obtain a new appraisal, which he hopes will result in a larger award. In the present case, the Trust, as a dissenting stockholder, has achieved the same end result (a new appraisal[1] with a larger award) by simply ignoring the Comptroller's appraisal. The fact that the justification in the present case for opening up the question whether the dissenter's stock may have been undervalued by the Comptroller was a finding that

[1]It is clear that the sole measure of the supplemental award to the Trust was the trial judge's redetermination of the value of the dissenter's shares on the effective date of the merger. (See BTNB Pet., pp. 36-38, 46-48.)

BTNB was guilty of misconduct[2] under state law does not change the fact that the Comptroller's award has been, effectively, set aside and a wholly new appraisal by a different tribunal substituted in its place.

Such an obvious subversion of the principle underlying the Supremacy Clause should not be tolerated. It has long been the position of this Court that infringement upon federal rights and prerogatives cannot be successfully concealed behind the labels assigned by state courts. Instead, the validity of state action must be judged by its real effect. *Corn Products Ref. Co. v. Eddy,* 249 U.S. 427, 432, 63 L.Ed. 689, 693 (1919); *St. Louis S.W. R. Co. v. Arkansas,* 235 U.S. 350, 362, 59 L.Ed. 265, 271 (1914); *Reitman v. Mulkey,* 387 U.S. 369, 373, 18 L.Ed.2d 830, 834 (1967); *Colonial Pipeline Co. v. Traigle,* 421 U.S. 100, 113, 44 L.Ed.2d 1, 12 (1975). State authorities cannot be permitted to achieve forbidden ends through indirection. *Anderson v. Martin,* 375 U.S. 399, 404, 11 L.Ed.2d 430, 433-4 (1964).

The disregard, and subversion, of federal authority over the merger process for national banks in the decision below is obvious. The fact that the parties in this case stand in a somewhat unusual relationship is of little importance. Many reasons can be found for condemning the actions of national banks under state law. If the decision below is permitted to stand, the stability that flows from federal authority over this important aspect of the merger process for national banks will have been significantly undermined. It is for this reason that the petition filed by BTNB should be granted.

[2]We have shown how flimsy the finding of misconduct is. (See BTNB Pet., pp. 17-18.)

B.

As to the counter-petition filed for the Trust (No. 79-386), we stress that, despite the claims in the Temporary Trustee's petition, the federal questions he would like to present to this Court have not been adequately preserved. (See BTNB's Brief in Opposition.)

The statement on page 6 of the Solicitor General's brief that "Both trustees filed a second appeal to the Alabama Supreme Court" is false or, at best, misleading. The Temporary Trustee, Harrison, took no appeal whatever to the Alabama Supreme Court. The co-trustee, Henley,[3] did file a cross-appeal, but it was limited to the question of who should pay the legal fees of the Trust in this litigation. Mr. Henley has no petition pending before this Court.

C.

Finally, we feel compelled to note that, contrary to the statement on page 2 of the Solicitor General's brief, BTNB's proxy materials describing the proposed reorganization contained a full statement of the appraisal rights of dissenting shareholders. (CC Ex. 69)

[3]We doubt that Mr. Henley had authority to act for the Trust at all, because the Alabama Supreme Court had directed that a temporary trustee be appointed *in lieu* of the named co-trustees to act for the Trust in the present litigation. (See BTNB Pet., p. 81.)

Respectfully submitted,

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FEBRUARY 1980

Supreme Court, U. S.
FILED
FEB 20 1980
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Nos. 79-374 and 79-386

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

BIRMINGHAM TRUST NATIONAL BANK, et al,
Petitioner,

v.

JACK H. HARRISON, et al,
Respondent

JACK H. HARRISON,
Petitioner,

v.

BIRMINGHAM TRUST NATIONAL BANK, et al,
Respondent

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF OF JACK H. HARRISON, AS TEMPORARY TRUSTEE OF THE LINN-HENLEY CHARITABLE TRUST IN RESPONSE TO BRIEF OF THE UNITED STATES AS AMICUS CURIAE AND IN RESPONSE TO THE BRIEF OF BIRMINGHAM TRUST NATIONAL BANK

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Nos. 79-374 and 79-386

IN THE

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ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

Brief of Jack H. Harrison, as Temporary Trustee of the Linn-Henley Charitable Trust in Response to Brief of the United States as Amicus Curiae and in Response to the Brief of Birmingham Trust National Bank

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I.

Response of Jack H. Harrison, as Temporary Trustee of the Linn-Henley Charitable Trust in support of the brief of the United States as Amicus Curiae, as it relates to the petition of BTNB for a Writ of Certiorari to the Supreme Court of Alabama in Cause No. 79-374

We support the view of the United States that the Petition of Birmingham Trust National Bank to review the decision of the Supreme Court of Alabama, which upheld

the judgment of the court below awarding to the Charitable Trust damages for the fraud and breach of fiduciary duty on the part of the bank, is based solely on state law of trusts and does not involve a federal question.

BTNB in its reply seeks to equate its position with that of the bank in *Simmons*. The distinction between that case and the case sub judice is clear. In *Simmons* a dissenting *stockholder* was simply dissatisfied with the amount of the Comptroller's appraisal and sought to set it aside, and obtain a new appraisal which, as BTNB states, he hoped would result in a larger award.

In the present case, however, the judgment in favor of the Trust was not based upon a review or setting aside of the appraisal of the Comptroller of the Currency. It was based entirely upon the fraud and breach of trust perpetrated by a trustee upon the beneficiaries of an express charitable trust. Thus, there was no attempt to review or override the appraisal made by the Comptroller of the Currency.

The damages awarded to the Trust flowed solely from the fraud, breach of fiduciary duties, conflict of interest and infidelity to the Trust on the part of BTNB, as corporate co-trustee, and on the principle that a wrongdoing trustee should not be allowed to profit by his wrongs, and that a wronged cestui should be made whole by the wrongdoer. Clearly, the judgment was based entirely upon state law of trusts and no federal question is here involved.

II.

Response of Jack H. Harrison, as Temporary Trustee of the Linn-Henley Charitable Trust, in support of his petition for Writ of Certiorari to the Supreme Court of Alabama in Cause No. 79-386

The brief of the United States makes several erroneous assumptions.

(a) In ¶ 2, Page 8, It Is Stated That Petitioner Harrison Challenges The Reversal Of The Award Of Damages To The Trust For Breach Of Fiduciary Duty Stemming From BTNB's Refusal To Permit The Trust To Bid For Shares At The Public Auction.

This statement is clearly erroneous in the face of the unquestionable contention by Petitioner (Petitioner's Petition, p. 28) that the Temporary Trustee never advanced this theory, per se. The real contention of Petitioner is set out on p. 29 of his Petition that ". . . this is not the heart of the case, it is simply another circumstance, which, together with the totality of all of the breaches of fiduciary duty and the violations of federal law, which brings into focus the federal questions here involved."

(b) The Next Point Made By The United States Is That The Complaint Cited Allegations Of Violations Of Federal Law Merely As Examples Of BTNB's Breach Of Fiduciary Duty Under State Law, And That These Violations Were Not Raised ". . . As Separate Federal Causes Of Action That The Alabama Supreme Court Was Required To Adjudicate . . ."

In the first place, the factual statement is incorrect. Under no circumstances can a fair reading of the first five paragraphs of Petitioner's Countercomplaint (A-72-79), of Count II (Pet. p. 32), and the analysis of Claim Two (App. A-82) justify the conclusion that the federal law violations were not raised as separate federal causes of action, nor is there any rhyme or reason to justify the further conclusion that the Alabama Supreme Court was not required to adjudicate the federal law violations apart from the state law question of breach of fiduciary duty. (See, Petition, pp. 28-30).

Furthermore, to follow the argument of the United States to its logical conclusion, it stands for the proposition

that any fraud by a national bank in connection with the purchase or sale of a security which falls clearly within the ambit of 15 U.S.C.A. § 77q(a) and Rule 10b-5, but which is alleged in a complaint as constituting also a violation of a fiduciary duty under state law does not present a federal question. This would pay homage to form rather than to substance, a concept entirely foreign to the Federal Rules of Civil Procedure. It is, of course, the substance of a claim and not the language used in stating it that controls the determination of its nature. *Blitz v. Boog*, 328 F.2d 596, (C.A. N.Y. 1964), Cert. denied, 85 S.Ct. 106, 379 U.S. 855, 13 L.Ed.2d 58.

More importantly, the rationale so advanced by the United States runs counter to the decisions of this and other courts as pointed out on pp. 24-25 of the Petition for Certiorari filed by the Petitioner.

(c) The Brief Of The United States Further Erroneously Seeks To Advance The View That The Comptroller Of The Currency Approved The Triangular Merger Here Involved And That Such Approval Was Entirely Proper On The Basis Of The Literal Terms Of The Banking Act.

In the first place, the record in this case is clear to the conclusion that the Comptroller of the Currency approved only the merger of BTNB into the phantom bank. The record is devoid of any evidence that the Comptroller approved the triangular merger. Indeed, there is nothing in the Banking Act which would permit the Comptroller of the Currency to do so.

On the contrary, as we have shown (Pet. p. 22), § 215a(a) specifically limits mergers to national banking associations and state banks into a national banking association.

Section 215a(d) provides for the sale at public auction of the shares of stock of the "receiving association" which

would have been delivered to the dissenting shareholders had they not requested payment. This is completely inconsistent with the concept that a merger agreement can provide for the delivery of stock of any corporation other than the stock of the "receiving association," especially the stock of a non-banking corporation which cannot be a third member of a triangular merger involving two national banks.

Furthermore, the implication in the brief of the United States that the Comptroller's interpretation of the statute was well established so as to permit triangular mergers in the year 1968 is inconsistent with the policy of the Comptroller as set out in Appendix to this brief.

At any rate, no interpretation of the Comptroller can override the clear provisions of the Federal Banking Act.

Accordingly, and contrary to the contention of BTNB, the failure of the merger agreement and the proxy material to inform the Trust of its right to retain the stock of the "receiving association" in lieu of the stock of the "Holding Company" constituted a material omission of fact, as a matter of law.

(d) In Note 7, Page 9, The United States Indicates That The Petitioner Is Challenging The Merger And Raises The Spectre Of Laches.

In the first place, the countercomplaint disclaims any attempt to unscramble the merger per se.

Secondly, we are dealing here with fraud on the part of a trustee of an express trust to which neither laches nor statute of limitations are applicable under Alabama law. *Heflin v. Heflin*, 93 So. 719, 208 Ala. 69. Furthermore, it is BTNB which filed the proceedings on October 6, 1971 seeking approval of the sale held in 1970. It is the 1970 sale of the "Holding Company" stock at public auction in violation of the Federal Securities laws, and the Regulations

of the Comptroller of the Currency, all accompanied by fraudulent manipulation, which was challenged by the Trust in 1971 and continuously thereafter. To say that such challenge might well be barred by laches is completely unfounded.

Furthermore, no act of the individual co-trustee can give comfort to the joint corporate co-trustee as against the beneficiaries of the Trust represented by Petitioner. There is no privity "between beneficiaries of a trust and the trustee which will make an estoppel against the trustee (Henley) operative against the beneficiaries." 31 C.J.S. Estoppel, § 135, *Fouke v. Schwenewerk*, 197 F.2d 234 (5th Cir.).

The Temporary Trustee is an officer of the court who replaced both trustees for the retrial of this cause. It is the interest of the beneficiaries of the Trust which is to be subserved by the judgments rendered by the court below, and not Henley.

(e) Finally, The United States Concludes That It Does Not Believe That The Petitioner's Federal Securities Law Claims Raised Questions Of Sufficient Importance To Merit Review By This Court.

This conclusion is unwarranted and is not supportable by the facts and the important substantial federal questions, here involved. We entertain the hope that this court deemed the federal questions raised to be of sufficient importance to invite the views of the United States. The United States has shown nothing to justify its belief that the Federal claims raised do not present substantial federal questions of sufficient importance to merit review by this court.

On the other hand, the poor, the hungry and other beneficiaries of this Charitable Trust are silent Petitioners herein to whom the judgment of $1,200,000 based upon federal

law is of the greatest importance. The reversal of this large judgment by the Supreme Court of Alabama clearly denies to them a right under the laws of the United States and merits the consideration and review by this Honorable Court.

III.

CONCLUSION

It follows, therefore, that the petition of BTNB for a Writ of Certiorari to the Supreme Court of Alabama should be denied and that the petition of Jack H. Harrison, as Temporary Trustee of the Linn-Henley Charitable Trust for a Writ of Certiorari to the Supreme Court of Alabama should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Morris K. Sirote, attorney for Jack H. Harrison, as Temporary Trustee of the Linn-Henley Charitable Trust, Respondent herein, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the day of February, 1980, I served copies of the above and foregoing brief in opposition to the Petition for Writ of Certiorari to the Supreme Court of Alabama, by mailing and depositing same in a United States Post Office or mail box, with first class postage prepaid, in a duly addressed envelope, to Hon. MacBeth Wagnon, Jr., 1500 Brown-Marx Building, Birmingham, Alabama 35203, attorney for Petitioner, Birmingham Trust National Bank; to Hon. Wade H. McCree, Jr., Solicitor General; Hon. Alice Daniel, Assistant Attorney General; Hon. Anthony J. Steinmeyer and Hon. Howard S. Scher, Attorneys, Department of Justice; and to Hon. Ronald R. Glancz and Hon. Ford Barrett, Attorneys, Comptroller of the Currency.

It is further certified that all parties required to be served have been served.

This, the 19 day of February, 1980.

MORRIS K. SIROTE, *Attorney for Jack H. Harrison, as Temporary Trustee of the Linn-Henley Charitable Trust, Respondent*
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APPENDIX

Comptroller of the Currency
Administrator of National Banks
Washington, D. C. 20219

August 22, 1978

Mr. John C. Henley, III
Individual Trustee
The Linn-Henley Trust
Birmingham, Alabama 35203

Dear Mr. Henley:

Your letter of June 5, 1978 to Mr. George LeMaistre, Chairman of the FDIC, regarding the use of "phantom" or "interim" banks to freeze out minority shareholders of national banks, has been referred to this Agency for reply. This Agency has the primary regulatory responsibility for the activities of national banks and their affiliates.

You state in your letter that "the 100% ownership of national banks by holding companies by means of which shareholders in national banks are squeezed out of their national bank stock contrary to law, creates", in your view, "the most serious risks for the future security of the National Banking System".

As you no doubt know, national banks are permitted by statute to merge provided that two-thirds of the shareholders of each association vote in the affirmative. 12 U.S.C. 215a. Section 215a provides further that any shareholder of the target bank who has voted against the merger is entitled to appraisal rights and cash for his or her interest. 12 U.S.C. 215a(b). This reflects the traditional, common law view that an appraisal and payment for one's shares affords fair and just compensation to dissenting sharehold-

ers while allowing the overwhelming majority to proceed with the merger.

Although it has traditionally been the policy of the Comptroller to charter "phantom" or "interim" banks for the purpose of facilitating the acquisition of banks by holding companies, the Comptroller, prior to 1974, did not approve the chartering of these banks for the purpose of facilitating freeze out mergers. Holding companies which were interested in engaging in a corporate reorganization of this type were advised to use the exchange or tender offer process. However, in 1974, it became apparent to the Comptroller that there may be legitimate corporate planning reasons for a holding company to engage in this type of corporate reorganization. Consequently, starting in late 1974, the Comptroller commenced the chartering of "phantom" or "interim" banks, thereby providing the necessary vehicle for the freeze out merger. As a condition precedent to the chartering of these "phantom" or "interim" banks, the Comptroller required a showing of:

(a) a valid business purpose for the merger — that it was not *solely* for the purpose of eliminating minority shareholders;

(b) complete fairness to the minority shareholders — the primary factor being the nature and adequacy of the consideration offered to the minority for their interest; and

(c) an affirmative vote of two-thirds of the minority shareholders.

These requirements were imposed in part because the Comptroller believed — and still believes — that the management, directors and controlling shareholders of a holding company owe a fiduciary obligation of honesty, loyalty, good faith, and fairness to the minority shareholders of affiliated banks and that this fiduciary obligation cannot be fulfilled merely by delegating to the minority shareholders their statutory appraisal rights.

The staff of this Agency is presently engaged in a full scale review of the policy surrounding the "phantom" or "interim" bank chartering process with an eye toward the issuance of a Policy Statement. As part of this review, our staff is in the process of reviewing the case cited in your letter, *Harrison v. Birmingham Trust National Bank*, ... Ala. ....., ... So.2d ..... (Case No. 168-659, Cir. Ct. 10th Cir., 1977), a copy of which was forwarded to us by Macbeth Wagnon, Esq. We would greatly appreciate receiving from you the article prepared by Prof. Loss, as well as any other materials you may have.

I appreciate your concern in this area and trust that this has been responsive to your inquiry.

Very truly yours,

/s/ Roberta Walsh Boylan

Roberta Walsh Boylan
Assistant Director
Legal Advisory Services Division